Gray, Cary, Ames & Frye, 1410 Bank of America Bldg., San Diego 1, California, Telephone: Franklin 7323, Attorneys for Plaintiffs.

Filed Jul. 31, 1953. T. H. Sexton, Clerk; by L. M. Adams, Deputy.

In the Superior Court of the State of California, in and for the County of San Diego. No. 180903.

J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs, vs. San Diego Building Trades Council, Millmen's Union, Local #2020, Building Material and Dump Truck Drivers, Local #36, John Does I to X inclusive, Defendants.

Entered Jul. 31, 1953, Judgment Book 14, page 25.

JUDGMENT

The above entitled case came on regularly for trial on the 1st day of June, 1953, before the Honorable John A. Hewicker, judge of the Superior Court, in Department One thereof, Gray, Cary, Ames & Frye by James W. Archer appearing for plaintiffs and Thomas Whelan, John T. Holt and Todd & Todd by Clarence E. Todd appearing for defendants, and evidence having been introduced and said case having been fully tried, argued and submitted, and the court having been fully advised in the premises, and the court having made its Findings of Fact and Conclusions of Law, Now, Therefore, pursuant to the said Findings of Fact and Conclusions of Law;

It Is Ordered, Adjudged and Decreed that the defendants, be, and they and each of them and their officers, members, agents, employees and all others acting on their behalf are hereby enjoined from picketing the places of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, expressed or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other acts tending or intended to injure plaintiffs' business, in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by reason of membership, or lack thereof, in any labor organization unless and until defendants, or any one or more of them, have been properly designated as the collective bargaining representative of plaintiffs' employees or an appriate unit thereof;

It Is Further Ordered, Adjudged and Decreed that the plaintiffs have and recover from the defendants and each of them, damages in the sum of One Thousand Dollars ($1000.00) together with their costs of suit herein incurred in the amount of $41.90.

Done in Open Court This 31 Day of July, 1953.

John A. Hewicker,
Judge of the Superior Court.

Appendix B

OPINION OF THE DISTRICT COURT OF APPEAL.

In the District Court of Appeal in and for the Fourth Appellate District, State of California.

J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs and Respondents, vs. San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Truck Drivers, Local 36, Defendants and Appellants. 4th Civil No. 4854.

Filed Aug. 25, 1954.

Appeal from a judgment of the Superior Court of San Diego County, John A. Hewicker, Judge. Reversed.

Todd and Todd; Thomas Whelan; and John T. Holt for appellants.

Gray, Cary, Ames & Frye; James W. Archer; and Ward W. Waddell, Jr. for respondents.

Plaintiffs, who are owners and proprietors as co-partners of a lumber business operating under the name of Valley Lumber Company, brought this action on May 7, 1953, to enjoin defendants from picketing plaintiff's place of business and for damages.

On or about November 15, 1952, Morris Collins, secretary of defendant San Diego Building Trades Council, called at plaintiff's place of business in Escondido and requested plaintiffs to sign a union contract. The contract submitted required plaintiffs to employ union labor in that it required plaintiffs' em-

ployees to be or become and remain members in good standing of defendant unions. Plaintiffs refused to sign this agreement, stating that they had no request from their men so to do. Thereafter Collins called on plaintiffs several times and was told that they were not ready to sign; that they did not know whether their employees wanted to become union members or not; and that Collins could discuss the matter with them.

Mr. Rutledge, plaintiffs' yard foreman, testified that on or about April 1, 1953, Mr. Garmon brought a union representative into the yard to talk to the men; the latter read the agreement to them and explained its provisions; the men discussed it and decided at that time to leave it up to plaintiffs as to whether they "wanted the union to enter." Subsequent to this meeting a second meeting was held at which no representative of the management or unions was present and at which the men definitely decided not to join the union. The plaintiffs had informed their employees that it was up to them to decide whether they wished to join the union. About the middle of April the company informed the union representatives of the decision of the men not to become union members. (Found in opinion of Appellate Court.)

Plaintiff William Garmon testified that after Collins talked with the men he stated they "were interested"; that a few days later he told Collins that as far as he knew, the men were perfectly satisfied and that he saw no advantage to plaintiffs in signing a contract; that the men had not requested such action;

that some time in April a Mr. Taylor (a union representative) came in and "wanted to know if we were ready to sign up their contract with them and I told him no and he says, 'Well, we are just going to have to do this the hard way.' I told him, 'You will just have to do it. We are not willing to sign any contract and if that is the way you want to do it, you will just have to do it the hard way.' So he left and he said, 'I will see you with a picket tomorrow morning' "; that the next morning, April 28th, a picket was placed near the entrance to plaintiffs' yard but on the highway and not on plaintiffs' property. The picket carried a banner of moderate size on which appeared the following:

"A. F. OF L.
PICKET

MILLMAN'S UNION 2020
TEAMSTER'S UNION 36
INVITES EMPLOYEES TO JOIN."

The picketing on the part of the unions was without violence, no untruths were claimed and there was no breach of the peace. There was only one banner carried at a time. There was no secondary boycott. No one was stopped entering or leaving plaintiff's property and no deliveries either way were stopped (by the defendants). There was evidence that on numerous occasions plaintiffs' trucks were followed when they made deliveries and that union trucks were seen circling jobs at which deliveries had been made

and that as a result of this it was necessary for the plaintiffs to make delivery of merchandise through other yards. (Opinion of Appellate Court.)

There was testimony that union agent Collins told the manager of another lumber company in Escondido that "they couldn't do anything and that they guessed they would have to get tough with him now" (referring to the Valley Lumber Company), and that Collins told contractors and others that the Valley Lumber Company was being picketed.

The trial court found, in part, that during the past year plaintiffs have sold lumber and other materials of the value in excess of one quarter of a million dollars, which originated and were manufactured outside of the state of California; that plaintiffs' business affects interstate commerce; that defendants demanded that plaintiffs sign the union contract referred to herein; that none of the defendants offered or produced any evidence that any employee of plaintiffs has designated any of said unions as his collective bargaining representative; that none of the defendant unions had been recognized by the plaintiffs or certified by the National Labor Relations Board as the representative of any employee of the plaintiffs; that none of the defendants has been designated or is the collective bargaining agent for any employee of the plaintiffs and the said employees have indicated that they do not desire to join or be represented by any of the defendants; that the plaintiffs declined to execute the said contract and informed the defendants that they could not enter into it or any contract contain-

ing the provisions relative to union membership of the employees unless and until it should appear that the plaintiffs' employees or some appropriate unit thereof designates one of the defendants union as their collective bargaining agent; that on or about April 28, 1953, the defendants placed pickets around the place of business of plaintiffs in Escondido and maintained pickets there up to and including the trial of the action; that by the placing of the picket line about plaintiffs' place of business the defendants intended to compel the plaintiffs to enter into certain union agreements and did not intend to induce the employees of plaintiffs to join the said union or to educate the plaintiffs or the employees of plaintiffs or to inform said employees of the benefits of unionization or to accomplish any other objective than to destroy the business of plaintiffs or to compel plaintiffs to execute said agreement without regard to the legality of doing so; that by the use of said pickets and by following the plaintiffs' trucks and by threatening persons doing business with plaintiffs and persons entering or about to enter plaintiffs' place of business with economic injuries, and by using language in the said picket lines calculated to instill fear of economic injury to such persons and by other means, and in order to compel the plaintiffs to execute the said agreement, even though it would be illegal to do so, the defendants and each of them have induced a number of the contractors engaged in the construction industry in or about the city of Escondido to cease doing business with plaintiffs and to refuse to accept

deliveries in plaintiffs' trucks and have induced various suppliers of materials and common carriers of freight to refuse to make deliveries to plaintiffs and have prevented persons intending to enter plaintiff's place of business from doing so and thereby have injured plaintiffs' business and put them to great expense in making deliveries and picking up supplies purchased by them; that as a result of the acts of defendants plaintiffs have lost business and profits and their business has been damaged in the sum of $1,000.00; that the National Labor Relations Board has, pursuant to a policy declared by it, refused to take jurisdiction of the controversy between plaintiffs and defendants for the purpose of determining whether defendants should be designated as the collective bargaining representatives of the employees of plaintiffs.

Judgment was entered enjoining the defendants from picketing the place of business of plaintiffs, from following their trucks, from preventing by means of threats persons having business with the plaintiffs from entering the premises of plaintiffs, from inducing by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept deliveries of goods from plaintiffs and from doing any other acts intended to injure plaintiffs' business in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by means of membership, or lack thereof, in any labor organization unless and until defendants

or any one or more of them have been properly designated as the collective bargaining representatives of plaintiffs' employees or an appropriate unit thereof, and that plaintiffs have and recover damages in the sum of $1,000.00.

It is first contended that the Superior Court had no jurisdiction to entertain the suit herein or enter the judgment appealed from. While the appellants contend that the evidence shows that defendants were picketing plaintiffs' place of business for the purpose of inviting the employees to join the union, there was evidence to support the trial court's finding that their purpose was to compel plaintiffs to execute a union contract when none of the unions involved had been designated as the collective bargaining agent for said employees. The determination of the purpose or object sought to be accomplished by the picketing was one of fact for the trial court. (Standard Grocer Co. v. Local No. 406 of A.F. of L., 321 Mich. 276; 32 N.W. 2d 519, 529.)

The National Labor Relations Act, as amended in 1947 (29 U. S. C. A. 1953 Cumulative Pocket Part, pages 48 and 49) provides that it is an unfair labor practice for an employer by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization and for a labor organization to force or require an employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of

such employees under the provisions of section 159 of the title (Sec. 158 (4) (B).)

In Garner v. Teamsters, Chauffeurs & Helpers Local Union No. 776, 74 S. Ct. 161, decided December 14, 1953, petitioners were engaged in the trucking business and had 24 employees, four of whom were members of respondent union. The trucking operations formed a link to an interstate railroad. No controversy, labor dispute or strike was in progress, and at no time had petitioners objected to their employees joining the union. Respondents, however, placed rotating pickets, two at a time, at petitioner's loading platform. None were employees of petitioner. They carried signs reading "Local 776 Teamsters Union (A. F. of L.) wants Employees of Central Storage & Transfer Co. to join them to gain union wages, hours and working conditions." Picketing was orderly and peaceful but drivers of other carriers refused to cross this picket line and, as most of petitioners' interchange of freight was with unionized concerns, their business fell off as much as 95 per cent. The court below found that respondents' purpose in picketing was to coerce petitioners into compelling or influencing their employees to join the union and concluded, after reviewing the Labor Management Relations Act (29 U. S. C. A., Sec. 141 *et seq.*) that such provisions for a comprehensive remedy precluded any state action by way of a different or additional remedy for the correction of the identical grievance. The Supreme Court said:

"Congress has taken in hand this particular type of controversy where it affects interstate commerce.

In language almost identical to parts of the Pennsylvania statute, it has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. The question then is whether the State, through its courts, may adjudge the same controversy and extend its own form of relief. . . .

"We conclude that when federal power constitutionally is exerted for the protection of public or private interests, or both, it becomes tthe supreme law of the land and cannot be curtailed, circumvented or extended by a state procedure merely because it will apply some doctrine of private right. To the extent that the private right may conflict with the public one, the former is superseded. To the extent that public interest is found to require official enforcement instead of private initiative, the latter will ordinarily be excluded. Of course, Congress, in enacting such legislation as we have here, can save alternative or supplemental state remedies by express terms, or by some clear implication, if it sees fit.

"On the basis of the allegations, the petitioners could have presented this grievance to the National Labor Relations Board. The respondents were subject to being summoned before that body to justify their conduct. We think the grievance was not subject to litigation in the tribunals of the State."

In Capital Service v. National Labor Relations Board, 74 S. Ct. 699, decided May 17, 1954, it was held that where Congress, acting within its constitutional authority, has vested a federal agency with exclusive jurisdiction over a subject matter and the intrusion of a state would result in conflict of functions, the federal court may enjoin the state proceeding in order to preserve the federal right.

In Gerry of Calif. v. Superior Court, 32 Cal. 2d 119 [194 P. 2d 689] it was held that under the National Labor Relations Act as amended in 1947, the State court has no jurisdiction, at the suit of a private person to enjoin union activities affecting interstate commerce when covered by the federal act. It was there said, quoting from Amalgamated U. Workers v. Consolidated Edison Co., 309 U. S. 261, 264 [60 S. Ct. 561, 84 L. Ed. 738]:

"'Within the range of its constitutional power, Congress was entitled to determine what remedy it would provide, the way that remedy should be sought, the extent to which it should be afforded, and the means by which it should be made effective.' The Supreme Court pointed out that the course of procedure was definite and restricted; that the board and the board alone could determine whether an employer had

engaged in an unfair labor practice; that the board was chosen as the instrument or agency, exclusive of any private person or group, to assure protection from the described unfair conduct in order to remove obstructions to interstate commerce, and that the board alone was authorized to take proceedings to enforce its order. The sole authority of the board to secure prevention of unfair labor practices affecting commerce was thus recognized."

It was further said:

"The provisions of the 1947 act show an intent to preserve the functional purposes of the National Labor Relations Act with increased objectives, and an intent not to confer powers on the courts at the suit of private parties with the exception of the jurisdiction expressly granted, which does not include the exercise of equity powers. . . . The employers as well as the union is now required by the 1947 act to proceed before the board to obtain appropriate relief from unfair labor practices affecting interstate commerce. The alleged cause for injunctive relief presents matters for the board to determine in the first instance pursuant to the exercise of power vested by the National Labor Relations Act as amended by the 1947 act. There is nothing in the act as so amended which indicates that these unions may not thus be subject to the appropriate procedure thereby provided."

In *In re* DeSilva, 33 Cal. 2d 76 [199 P. 2d 6], an employer had secured an injunction on the ground that the picketing was unlawful under the Labor Management Relations Act, 1947, since there had been

no certification of a union representative. It was there held that the injunction issued was void, its object being to accomplish something which was within the exclusive jurisdiction of the National Labor Relations Board under the terms of the federal act. In commenting on the Gerry case, *supra,* the court said:

"This court there held that the declared intent and purpose of the Labor Management Relations Act, 1947, was to vest exclusive jurisdiction in the National Labor Relations Board over unfair Labor practices affecting interstate commerce and to vest in the courts generally jurisdiction only of action for damages arising out of the commission of such practices, and that the act deprived the superior courts of original equitable jurisdiction in such cases."

The case of Sommers v. Metal Trades Council, 40 Cal. 2d 392 [254 P. 2d 539], involved a claimed violation of the jurisdictional Strike Act. (Lab. Code, Sec. 115 *et seq.*) and the same union activity was declared to be an unfair labor practice by the National Labor Relations Act, as amended. The question there was whether the state court had jurisdiction to enforce the provisions of the state statute making the defined union jurisdictional activity unlawful and subject to restraint. It was held that the trial court did not abuse its discretion in granting an injunction order pending a trial on the merits. The court discussed the Gerry case, *supra,* and observed that there the petitioners contended that the state had concurrent jurisdiction with the National Labor Relations Board

to enforce the provisions of the federal act and that the decision rejecting this contention was a determination that in the absence of a valid, applicable local statute affording relief, facts which amount to unfair labor practices under the federal act are cognizable exclusively in a proceeding before the National Board. After discussing several United States Supreme Court cases on the subject, the court said:

"It is thus apparent that the factors of protection and condemnation under the federal act largely determine whether the area is one closed to state control. The decisions indicate that the presence of those factors are deemed to disclose an intention on the part of Congress to place exclusive jurisdiction in the National Board."

In the instant case plaintiffs pleaded and the court found that they were engaged in interstate commerce. The claimed objectionable conduct of the unions is defined in the federal act as an unfair labor practice but there is no state statute making it unlawful as was the case in Sommer v. Metal Trades Council, *supra*. We therefore conclude that the state court in the instant action had no jurisdiction to grant the permanent injunction herein.

It is argued that although the federal law is applicable, the National Labor Relations Board has, as a matter of policy, declined to accept jurisdiction and that there can be no conflict of remedies between the courts and the board. However, the evidence shows that on May 7, 1953, plaintiffs' counsel mailed to the National Labor Relations Board a petition by the

Valley Lumber Company for determination of representation of its lumber yard and delivery workers. This petition was apparently dismissed by the regional director for the reason that the scope of the business involved did not justify further proceedings. The petition contained no application to the National Board to take jurisdiction of an unfair labor practice charge and the evidence fails to show a refusal of the board to assume jurisdiction of the acts and conduct of the unions involved in that connection. Since the National Labor Relations Board had jurisdiction to determine plaintiff's right to injunctive relief herein, the state court was without jurisdiction until plaintiffs exhausted their administrative remedy. (United States v. Superior Court, 19 Cal. 2d 189, 195; Abelleira v. District Court of Appeal, 17 Cal. 2d 280, 292; Woodward v. Broadway Fed. S. & L. Assn., 111 Cal. App. 2d 218, 220; Myers v. Bethlehem Shipbuilding Corporation, 303 U.S. 41; 82 L. Ed. 638.)

Respondents argue that the federal law does not prevent a state court from awarding damages for a violation of a state public policy which does not conflict with the federal law; that the remedy in the instant case is for intentional, unexcused injury to the business of another and that the injury herein is unexcused because for an unlawful purpose, namely, to compel the execution of a contract in violation of the National Labor Relations Act.

In United Const. Workers, Etc. v. Laburnum Const. Corp., *supra*, the court held that the Labor Manage-

ment Act of 1947 (National Labor Relations Act, Sec. 10 (c), as amended by Labor Management Relations Act of 1947, 29 U.S.C.A. Sec. 160 (c); Labor Management Relations Act of 1947, Sec. 303 (b), 29 U.S.C.A. Sec. 187 (b).), did not give the National Labor Relations Board such exclusive jurisdiction over the subject matter of common law court actions for damages as would preclude an appropriate state court from hearing and determining its issues even though such conduct constitutes unfair labor practice under that act; that Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. However, in this state peaceful picketing is a lawful form of concerted action by members of the labor union. (Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379, 382, [106 P. 2d 403].) As was said in Seven Up Etc. Co. v. Grocery Etc. Union, 40 Cal. 2d 368, 374: "Peaceful picketing has been identified with freedom of speech—a means by which the pickets communicate to others the existence of a labor controversy" (Citing many cases.) In Park & T. I. Corp. v. Int. Etc. of Teamsters, 27 Cal. 2d 599, 603, the court said:

"In this state 'a union may use the various forms of concerted action, such as strike, picketing, or boycott, to enforce an objective that is reasonably related to any legitimate interest of organized labor' but 'the object of concerted labor activity must be proper and . . . must be sought by lawful means, otherwise the persons injured by such activity may obtain dam-

ages or injunctive relief.' (James v. Marinship Corp., 25 Cal. 2d 721, 728, 729 [155 P. 2d 329], and authorties there cited.)"

In McKay v. Retail Auto. S. L. Union No. 1067, 16 Cal. 2d 311, 319, the court said:

"Concerning the means used, it must be taken as settled in this state, that workmen may associate together and exert various forms of economic pressure upon employers, provided they act peaceably and honestly. The conventional means of exerting this economic pressure which have been held lawful are the strike . . . the boycott, both primary and secondary . . . and the picket . . ."

In Fortenbury v. Superior Court, 16 Cal. 2d 405, 410, it is held that the law does not invariably give relief against damage, because in some circumstances the infliction of damage, though intentional, is without legal remedy. "So far as cases of picketing or boycott are concerned, there is no remedy for damage which may be inflicted where, as here, the means are peaceful and the purpose is reasonably related to working conditions or the right to bargain collectively."

In Bautista v. Jones, 25 Cal. 2d 746, 755, Mr. Justice Edmonds, in his concurring opinion, states:

"And in the exercise of its constitutional right of free speech, a union is privileged intentionally to induce others, in their relation with an employer, to apply economic pressure upon him resulting in injury. However, this privilege to interfere with a competi-

tor's valuable and legally protected economic interests is not an absolute one, but is qualified and conditional.

"The first limitation which has been applied by this court is that a union, in compelling compliance with its demands through the application of economic pressure, induced by publication of the facts and solicitation of support, is privileged to invade the interests of others only where it employs peaceful and truthful means. (Citing cases.) The second general condition necessary to justify the invasion of economic interest is that the end be lawful. 'Any injury to a lawful business . . . is *prima facie* actionable, but may be defended upon the ground that it was merely the result of a lawful effort of the defendants to promote their own welfare.' (J. F. Parkinson Co. v. Building Trades Council, *supra.*)"

In the instant case the attempt by the unions to induce plaintiffs to sign the contract involved is not made unlawful by statute in this state. The means used were peaceful and the purpose is reasonably related to working conditions and the right to bargain collectively. Damages, if any, suffered by plaintiffs were occasioned by the presence of a picket near plaintiffs' place of business, carrying a banner inviting plaintiff's employees to join the union and not by the alleged purpose of the picketing. Moreover, the award of damages in the sum of $1,000.00 was apparently based on the testimony of one Glenn Bailey that he had once purchased materials from the plaintiffs but that he had overheard a conversation between a union representative and the witness contractor in

which they were discussing the picketing of plaintiffs' place of business; that he had intended to buy his materials on a new job from plaintiffs but had changed his mind; that the approximate cost of materials on the new job was $4,000.00. The award of $1,000.00 damages was not supported by substantial evidence that it was caused by the tortious conduct of defendants or any of them.

The attempted appeal from the order overruling the demurrer herein is dismissed as such an order is not appealable. (Garroway v. Jennings, 180 Cal. 97; Southern Cal. Tel. Co. v. Damenstein, 81 Cal. App. 2d 216; Cook v. Stewart McKee & Co., 68 Cal. App. 2d 758.)

Judgment reversed.

Mussell, J.

I Concur:

Barnard, P. J.

Appendix C

Opinion of the Supreme Court of the State of California

In the Supreme Court of the State of California in Bank.

J. S. Garmon, J. M. Garmon and W. A. Garmon, Plaintiffs and Respondents, v. San Diego Building Trades Council, Millmen's Union, Local 2020, Building Material and Dump Drivers, Local 36, Defendants and Appellants. L. A. 23005.

Filed Dec. 2, 1955.

The Garmons, while engaged in business as partners under the name of Valley Lumber Company, became involved in a dispute with union labor organizations. The appeal is from a judgment which enjoins the unions and their members from carrying on certain activities and awards damages in the amount of $1,000 against them.

Following a trial, the court made these findings of fact:

Valley Lumber Company is engaged in the business of selling lumber and building materials, and its operations affect interstate commerce. In the previous year it sold materials originating and manufactured out of California of a value exceeding $250,000. None of its employees belong to any of the defendant unions and none have designated either of these as a labor representative. The employees have indicated that they do not desire to join, or be represented by, a

union. The National Labor Relations Board has not certified either of the unions as the representative of the employers and the company has not recognized any union as such.

The union demanded a labor agreement containing a clause which would require the company to employ, and continue in employment, only such persons as are, or immediately become, members of the defendant unions.[1] The company refused to execute the agreement, upon the grounds that it would be a violation of the National Labor Relations Act to do so before the employees, or an appropriate unit thereof, designated a union as its collective bargaining agent. Shortly thereafter, the unions placed pickets at the company's place of business.

The intent of the unions was not to induce the employees to join one of them, or to provide education or information as to the benefits of unionization. The only purpose was to force the company to execute the agreement or suffer destruction of its business. In addition to picketing, union agents followed the company's trucks and threatened persons about to enter its place of business with economic injury. By

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[1] "Pursuant to the terms of Section 8(a)(3) of the Labor Management Relations Act, 1947, there shall be no limitation of the Employer as to whom he shall employ, continue in employment, or discharge, except that every employee listed under Section III, (A) and (B), hereof not otherwise excluded, shall be, or shall make application within thirty (30) days, become and remain a member in good standing of Millmen's Union, Local 2020, of the United Brotherhood of Carpenters and Joiners of America, or Building Material and Dump Truck Drivers, Local 36."

this conduct, and the use of language calculated to instill fear of such injury, the unions induced building contractors to discontinue their patronage of the company, with subsequent damage to the business amounting to $1,000.

The National Labor Relations Board, "... pursuant to a policy declared by it, refused to take jurisdiction of the controversy between plaintiffs and defendants for the purpose of determining whether defendants should be designated as the collective bargaining representative of the employees of plaintiffs."

Upon these findings a judgment was entered which awards the company $1,000 damages and enjoins the unions "... from picketing the places of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, express or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other acts tending or intended to injure plaintiffs' business, in order to compel plaintiffs to execute any contract with the defendants, or any of them, requiring plaintiffs to discriminate with respect to conditions of employment by reason of membership, or lack thereof, in any labor organization unless and until defendants, or any one or more of them, have been properly desig-

nated as the collective bargaining representative of plaintiffs' employees or an appropriate unit thereof."

The unions contend that jurisdiction of the controversy is exclusively in the National Labor Relations Board. They also attack the judgment upon the grounds that the company did not exhaust its administrative remedies. Other points presented are: the evidence does not support the findings; the findings do not include all issues tendered; the award of damages is based upon evidence entirely speculative; and, the record shows no violation of any state law.

In support of the judgment, the company asserts that the jurisdiction of the national board is not exclusive, or if it is, the state court may enjoin unlawful conduct when the board has declined to act. Another point relied upon is that, regardless of state jurisdiction to enjoin the unions, the superior court's award of damages for violation of the state's public policy is not contrary to any federal law.

The National Labor Relations Board has exclusive primary jurisdiction to prevent unlawful demands. (Weser v. Anheuser-Busch, Inc., ... U. S. .....; Garner v. Teamsters, Chauffeurs, and Helpers, etc., 74 S. Ct. 161; United Construction Workers v. Laburnum Const. Corp., 347 U. S. 656; Bethlehem Steel v. N. Y. State LRB, 330 U. S. 769.) The purpose of the picketing was to compel the company to sign an agreement which included a clause requiring the employer to encourage membership in the unions. In the circum-

stances here shown, under the Labor Management Relations Act, this was an unfair labor practice.[2]

In the Garner case, a Pennsylvania court enjoined picketing which, contrary to a state statute, was being carried on for the purpose of coercing an employer to compel or "influence" employees to join the union. The State Supreme Court reversed the judgment upon the ground that the employer's sole remedy was that provided by the National Labor Management Relations Act. (Garner v. Teamsters, [Pa.] 94 A. 2d 893.) The United States Supreme Court agreed, holding "that petitioner's grievance fell within the jurisdiction of the National Labor Relations Board to prevent unfair labor practices . . ."

However, the Board need not accept every controversy of which it has jurisdiction. (Haleston Drug Stores v. National Labor Relations Board, 187 Fed. 2d 418. See discussion by Philip Feldblum, Jurisdictional "Tidelands" in Labor Relations, 3 Labor Law Journal 114.) It hears and determines controversies only in connection with "enterprises whose operations have, or at which labor disputes would have, a pro-

[2](a) "It shall be an unfair labor practice for an employer . . . (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization . . ."

(b) "It shall be an unfair labor practice for a labor organization or its agents . . . (2) to cause or attempt to cause an employer to discriminate against an employee in violation of subsection (a) (3) or to discriminate against an employee with respect to whom membership in such organization has been denied or terminated on some ground other than his failure to tender the periodic dues and the initiation fees uniformly required as a condition of acquiring or retaining membership. . . ." (29 U. S. C. §158.)

nounced impact upon the flow of interstate commerce." (National Board Press release dated October 6, 1950.)

In the present case, the employer's position is that, when the National Labor Relations Board refuses to take jurisdiction of a dispute because the effect of the company's business on interstate commerce is not substantial, the state courts may act. The United States Supreme Court has not decided this question. In the Garner case it pointed to the lack of any indication that "the federal Board would decline to exercise its powers once its jurisdiction was invoked." (Garner v. Teamsters, etc., 74 S. Ct. 161 at 164.) Later in Building Trades Council *et al.* v. Kinard Construction Co., 346 U. S. 933, in reversing a state court's affirmance of an injunction on the authority of the Garner case, it said: "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the Board decline to exercise its jurisdiction."

The reason for prohibiting state courts from acting in cases in which the Board has jurisdiction is to obtain uniform application of the substantive rules as expressed by Congress, and to avoid diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. (Garner v. Teamsters, etc., 74 S. Ct. 161, 166.) A remedy under federal laws available to an injured

party may justify pre-emption of the field of labor relations, but when the application of that rule would result in the loss of all protection, there is no reason to bar state courts from providing relief. There is no conflict of jurisdiction when the federal board determines not to adjudicate the issues. Furthermore, a refusal to accept jurisdiction upon the ground that the issue presented does not sufficiently affect the national welfare to justify the Board's attention, in effect, is a declaration that the national labor policy will not be jeopardized if the state assumes jurisdiction.

When Congress enacted the applicable statutes, it must have been aware that an unfair labor practice may affect management and labor in a small business to the same extent as in a large industry. The difference is only the effect on the national labor and economic level. Certainly Congress did not intend to deprive a business having only a limited effect on interstate commerce of all protection in a labor-management controversy. By giving the Board discretion to accept or refuse jurisdiction, the legislative purpose must have been to give the state courts jurisdiction when the Board specifically determines that the controversy will not affect the national economy. (Accord: Your Food Stores v. Retail Clerks' Local No. 1564, 124 Fed. Supp. 697, 703; Truck Drivers, etc. v. Whitfield Transportation, 273 S. W. 2d 857, 860; But *Cf.*: New York State Labor Relations Board v. Wags Transportation System, 130 N. Y. S. 2d 731; Universal Car & Service Company v. International Association of Machinists, 27 CCH Labor Law Reporter, 68,825.)

In the present case, the employer filed a petition for determination of representation, pursuant to the provisions of the National Labor Relations Act. It was informed by letter that "The amount of business done by Valley Lumber Company in interstate commerce is insufficient for the Board to assert jurisdiction on the basis of previous Board decisions." Later, the regional director of the Board dismissed the petition, after a careful investigation. He stated that "in view of the scope of the business operation involved, it would not effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time . . ." It appears without conflict that only $250,000 of the company's business during the preceding year was in interstate commerce, either directly or indirectly. In view of the general pronouncement by the Board (Press Releases dated October 6, 1950 and July 14, 1954) that it will exercise jurisdiction only when an "enterprise" has a direct inflow of material valued at $500,000 a year, or an indirect flow valued at $1,000,000, a request for review of the Regional Director's action would have been futile. . .

The general policy of the Board in regard to jurisdiction makes no distinction between an application to determine representation and one complaining of an unfair labor practice. A refusal to take jurisdiction of a controversy concerning representation constitutes a refusal to accept jurisdiction of a complaint against that employer which charges an unfair labor practice. In C. A. Braukman, etc. and International Union of Operating Engineers, 94 N. L. R. B. 234, the Board

said, "True, the Board has not heretofore considered the instant complaint case. However, because the Board does not, with respect to the question of jurisdiction, differentiate between representation and complaint cases, we believe that dismissal of the . . . representation case on jurisdictional grounds . . . was in effect, notice to all parties concerned that any complaint case based on alleged unfair labor practices . . . would similarly be dismissed." (Also see: National Labor Relations Board v. Guy F. Atkinson Co., 195 Fed. 2d 141.)

Section 10(a) of the Taft-Hartley Act, (29 U. S. C. 160(a)) gives the Board the power to prevent any person from engaging in an unfair labor practice when it affects interstate commerce. That section also empowers the Board, by agreement, to cede jurisdiction of cases affecting such commerce to state agencies so long as the state law is not inconsistent with the national labor policy as expressed in the federal laws. But Congress has not prohibited the state from assuming jurisdiction of conduct which would amount to an unfair labor practice under the federal law when the Board refuses to take jurisdiction. When jurisdiction is declined by the Board, the legislative mandate that nothing shall affect the Board's power to enforce the act is not infringed upon.

The basis for refusing to allow a state court to take jurisdiction of a dispute within the cognizance of the Board *in advance* of action by it is the purpose to avoid a possible conflict between state policy and that of the Board in an area in which the federal body has not had an opportunity to act. "Coincidence" of pol-

icy, the United States Supreme Court has declared, is not sufficient to avoid the danger of a possible conflict. (Bethlehem Steel v. N. Y. State LRB, 330 U. S. 769.) However, if the state court should refuse to assume jurisdiction when the Board has affirmatively declined to act, one party to the labor controversy might be able to flout the policy expressed by Congress in the national legislation.

The unions complain of the court's asserted failure to make a finding on their allegation that there was no unfair labor practice because, as clearly stated, the contract was not to be signed, and if signed, would not be accepted by the union unless the employees became members of it. But the findings that the unions presented the agreement to the company with a demand for its signature, followed by picketing and other activity with the purpose to compel the employer to execute the agreement although it would be illegal to do so, was a determination against the unions upon this defense.

The company argues that the trial court properly gave both damages and injunctive relief. It relies upon the rule stated in James v. Marinship, 25 Cal. 2d 721, that "the object of concerted labor activity must be proper and that it must be sought by lawful means, otherwise the persons injured may obtain damages or injunctive relief." (P. 728.) They assert that damages were a proper redress for the injuries previously suffered from the picketing and concerted activities by defendants and an injunction is proper to avoid future injury. The appellants take the posi-

tion that "the conduct of the labor union was lawful and proper in the light of both federal and state law."

One argument is that since the ultimate objective of the concerted economic pressure was to obtain a closed shop, which is a proper labor objective under the law of California (McKay v. Retail Auto L.L. Union No. 1067, 16 Cal. 2d 311, 327; Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379, 387-388), the purpose of the picketing was not "unlawful" and hence not within the rule of the Marinship case. For this proposition, reliance is placed upon Park & Tilford I. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599.

The Park & Tilford case concerned an injunction which, a majority of the court concluded, was broader than that allowed by the pleadings and the evidence. There, without having obtained the requisite majority of employees for the purposes of collective bargaining, a labor organization picketed and boycotted the employer after demanding of him that he sign a closed shop agreement with that organization. An injunction was granted restraining the union from all interference with the sale or delivery of the plaintiff's products and from all picketing and boycotting of its business. This relief was too broad, said a majority of the court, although the trial judge was correct in the conclusion that the demands made by the union were unlawful under the National Labor Relations Act.

The evidence as to the union's conduct, said the court, did not support the finding that the purpose of the concerted economic pressure was to compel the

employer to violate the federal law by discriminating as to his employer's choice of union representation. Instead, it was held, the ultimate purpose of the economic pressure was to bring about a closed shop agreement, which would be lawful under both California law and the controlling federal statutes. The court further held that, although the federal act made unlawful the employer's signing of such an agreement before a requisite majority of his employees was obtained by the union, the statute did not proscribe the assertion of economic pressure by the unions upon both him and his employees, to compel their accession to union demands, before the time at which the employer might lawfully comply with them. This construction of the federal act was based, in part, upon an analogy made to the Shafer and McKay cases, *supra,* in which quite similar provisions in sections 921-923 of the California Labor Code were construed as protecting employees from improper employer influence but not as protecting the employer from economic pressure designed to bring about a closed shop agreement.

Since those decisions, however, the federal statute has been broadened to extend protection to the employer from such activities. (29 U. S. C., §158(b)(2).) The assertion of economic pressure to compel an employer to sign the type of agreement here involved is an unfair labor practice under section 8(b)(2) of the Act. (*Cf.* Great Atlantic & Pacific Tea Co. (1949), 81 N.L.R.B. 1052.) Concerted labor activities for such a purpose thus were unlawful under the federal statute, and for that reason were not privileged under the

California law. (*Cf.* Park & Tilford I. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599, 604; Lillefloren v. Superior Court, 31 Cal. 2d 439, 440.)

It is argued, however, that the purpose of the concerted activities here complained of was to invite the employees to join the union. But the court found that the purpose of the picketing was not to induce the employees to join the unions but to compel the company to sign the proffered agreement or suffer destruction of its business. To hold that a contrary objective was intended would require this court to draw different inferences from the evidence which amply supports the finding of the trial court.

Finally, it is argued that the evidence does not support the finding as to the amount of damages. However, there is testimony that the employer, as a result of the picketing, was required to pick up and deliver its products at different yards, incurring the expense of additional man hours and trucking facilities. The record also shows that at least one prospective purchaser was induced to purchase materials at another yard because of the union activities, resulting in the loss of profits at least as great as the amount of damages awarded. This evidence amply supports the judgment insofar as damages are concerned.

The judgment is affirmed.

EDMUNDS, *J.*

We concur:

SHENK, *J.*

SCHAUER, *J.*

SPENCE, *J.*

DISSENTING OPINION

I dissent.

In this case defendant unions were enjoined from peaceful picketing to organize plaintiffs' employees, have them join defendants and have defendants as their bargaining representatives; damages were also awarded to plaintiffs for the picketing. The trial court found that plaintiffs' business affected interstate commerce. Plaintiffs requested the National Labor Relations Board to hold an election to determine who should represent their employees. The board dismissed the proceeding. The majority opinion holds that the case is one in which the board would normally have jurisdiction and the state court would not, because defendants' activity was an unfair labor practice under the National Labor Management Relations Act (29 U.S.C.A. §151 *et seq.)** but, says the majority, in this case the state court has jurisdiction because the board refused to take jurisdiction by dismissing the representation proceedings and that federal law (Labor Management Relations Act) rather than state law is applicable; that under the federal law defendants' conduct being an unfair labor practice, the picketing was for an unlawful purpose. Hence defendants were properly enjoined and damages awarded against them. In other words, the state court is to enforce the federal law.

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*That is clearly the law. (Weber v. Anheuser-Busch, Inc., 75 S. Ct. 480; Garner v. Teamsters Union, 346 U. S. 485; United States Workers v. Laburnum, 347 U. S. 656; Building Trades Council *et al.* v. Kinard Construction Co., 346 U. S. 933.)

Those conclusions are fallacious for the following reasons: (1) The national board and the powers granted to it are an integral part of the federal law and that law is not intended to have application in a situation where the board plays no part; it is inescapable that the federal law is to be administered by the board, not by the state courts. (2) The board, in refusing jurisdiction as it has power to do, has in effect determined that the federal law should not apply in this case. (3) It is neither feasible nor fair to apply the federal law. (4) There has not been such a refusal to exercise jurisdiction by the board here as to justify the conclusion that the state court has jurisdiction.

Before discussing those points it should be observed that under our law defendants' activity is lawful and hence neither damages nor injunctive relief is proper. The majority does not question this proposition. The rule was stated with the citation of many supporting authorities in Park & T. R. Corp. v. Int. etc. of Teamsters, 27 Cal. 2d 599, 604: "The closed shop is recognized as a proper objective of concerted labor activities, even when undertaken by a union that represents none of the employees of the employer against whom the activities are directed. (McKay v. Retail etc. Union No. 1067, 16 Cal. 2d 311, 319, 322 [106 P. 2d 373]; Shafer v. Registered Pharmacists Union, 16 Cal. 2d 379, 382 [106 P. 2d 403]; C. S. Smith Met. Market Co. v. Lyons, 16 Cal. 2d 389 [106 P. 2d 414]; Sontag Chain Stores Co. v. Superior Court, 18 Cal. 2d 92 [113 P. 2d 689]; see Fortenbury v. Superior

Court, 16 Cal. 2d 405 [106 P. 2d 411]; Steiner v. Long Beach Local No. 128, 19 Cal. 2d 676, 682 [123 P. 2d 20]; Emde v. San Joaquin County etc. Council, 23 Cal. 2d 146, 155 [143 P. 2d 20, 150 A.L.R. 916]; Lisse v. Local Union, 2 Cal. 2d 312 [41 P. 2d 314]; In re Lyons, 27 Cal. App. 2d 293 [81 P. 2d 190]; J. F. Parkinson Co. v. Building Trades Council, 154 Cal. 581 [98 P. 1027, 16 Ann. Cas. 1165, 21 L.R.A.N.S. 550]; Pierce v. Stablemen's Union, 156 Cal. 70 [103 P. 324].) . . . A union may picket and boycott an employer's business with the object of so discouraging public support of the business that the nonunion workers will face the prospect of the loss of their jobs. . . .

"Picketing and boycotting unquestionably entail a hardship for an employer when they affect his business adversely. The adverse effect upon the employer's business that may result from the competition among workers for jobs is comparable to the adverse effect on his business that may result from his own competition with other employers. It is one of the risks of business. (See C. S. Smith Met. Market Co. v. Lyons, 16 Cal. 2d 389, 398 [106 P. 2d 414].) 'The law . . . permits workers to organize and use their combined power in the market, thus restoring, it is thought, the equality of bargaining power upon which the benefits of competition and free enterprise rest. Accordingly, the propriety of the object of workers' concerted activity does not depend upon a judicial determination of its fairness as between workers and employers.' (4 Restatement: Torts, p. 118.) . . .

"[I]n Shafer v. Registered Pharmacists Union, *supra,* the court stated: 'The argument is .... made that it is absurd to suppose that these provisions were written with the intention of restraining the employer from influencing his employee, while at the same time conferring upon other individuals the right "to coerce" the same employee through the employer. But the right of workmen to organize for the purpose of bargaining collectively would be effectually thwarted if each individual had the absolute right to remain "unorganized," and using the term adopted by the appellants to designate the economic pressure applied against them through the employer, coercion may include compulsion brought about entirely by moral force. Certainly such compulsion is not made contrary to public policy by any statute of this state and is a proper exercise of labor's rights. (Senn v. Tile Layers' Union, 301 U.S. 468 [57 S. Ct. 857, 81 L. Ed. 1229]; Lauf v. E. G. Shinner & Co., 303 U.S. 323 [58 S. Ct. 578, 82 L. Ed. 372]; Fur Workers' Union No. 72 v. Fur Workers' Union No. 21238 (1940), 105 F. 2d 1, aff'd 308 U.S. 522 [60 S. Ct. 292, 84 L. Ed. 443].)'"

Speaking to the first point, it is clear that the national board and not a state court is to administer the federal law, at least in situations involving unfair labor practices. It is the forum which is to decide what steps, if any, should be taken, to interpret initially the law, to make rules and regulations amplifying the law, to decide what is best for interstate commerce when activity in a labor controversy is claimed to interfere

with it, to maintain uniformity in the treatment of cases, etc. The stated purpose of the federal law is to preserve certain rights and protect commerce (29 U.S.C.A. §151). The national board is created and it must report to Congress on the cases it has heard. (*Id.*, §153.) It may make rules and regulations to carry out the act. (*Id.*, §156.) Unfair labor practices are defined. (*Id.*, §158.) The board "shall decide" "... whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of sections 151-166 of this title, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

"(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected." (*Id.*, §159.) The board "... is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 158 of this title) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: *Provided*, That the Board is empowered by agreement with any agency of any State or Territory to cede to such agency jurisdiction over any cases in any industry (other than mining, manufacturing, communications, and transportation

except where predominantly local in character) even though such cases may involve labor disputes affecting commerce, unless the provision of the State or Territorial statute applicable to the determination of such cases by such agency is inconsistent with the corresponding provision of this subchapter." *(Id.,* §160.) If it is charged that an unfair labor practice is being committed the board "may" issue a complaint and shall decide the matter; it "may" ask a *federal* court for equitable relief in enforcing its decision, and its decision may be reviewed by a *federal* court. *(Id.,* §160.) Immunity from prosecution is accorded witnesses who are compelled to testify before the board. *(Id.,* §161.) These and many other provisions clearly envision that the federal law is not to operate without the national board. That proposition was pointed out in Garner v. Teamsters Union, 346 U.S. 485, 488: "Congress has taken in hand this particular type of controversy where it affects interstate commerce. . . . [I]t has forbidden labor unions to exert certain types of coercion on employees through the medium of the employer. It is not necessary or appropriate for us to surmise how the National Labor Relations Board might have decided this controversy had petitioners presented it to that body. The power and duty of primary decision lies with the Board, not with us. But it is clear that the Board was vested with power to entertain petitioners' grievance, to issue its own complaint against respondents and, pending final hearing, to seek from the United States District Court an injunction to prevent irreparable injury to petitioners while their case was being considered. . . .

"Congress did not merely lay down a substantive rule of law to be enforced by any tribunal competent to apply law generally to the parties. It went on to confide primary interpretation and application of its rules to a specific and specially constituted tribunal and prescribed a particular procedure for investigation, complaint and notice, and hearing and decision, including judicial relief pending a final administrative order. Congress evidently considered that centralized administration of specially designed procedures was necessary to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures and attitudes toward labor controversies. . . . A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law. The same reasoning which prohibits federal courts from intervening in such cases, except by way of review or on application of the federal Board, precludes state courts from doing so. . . . And the reasons for excluding state administrative bodies from assuming control of matters expressly placed within the competence of the federal Board also exclude state courts from like action." (Emphasis added.) And it is said in Textile Workers Union of America v. Arista Mills Co., 193 F. 2d 529, 533: " 'It is perfectly clear, both from the history of the National Labor Relations Act and from the decisions rendered thereunder, that the purpose of that act was "to establish a single paramount administrative or quasi-judicial authority

in connection with the development of federal American law regarding collective bargaining"; that the only rights made enforceable by the act were those determined by the National Labor Relations Board to exist under the facts of each case; and that the federal trial courts were without jurisdiction to redress by injunction or otherwise the unfair labor practices which it defined.'" It should be clear, therefore, that the Labor Management Relations Act in dealing with unfair labor practices can only be enforced by the intervention of the national board, and that state courts are not in a position to apply that law.

In regard to the second point it is settled that the national board may refuse jurisdiction because interstate commerce is not sufficiently affected. "Even when the effect of activities on interstate commerce is sufficient to enable the Board to take jurisdiction of a complaint, the Board sometimes properly declines to do so, stating that *the policies of the Act would not be effectuated* by its assertion of jurisdiction in that case." (Emphasis added; Labor Board v. Denver Bldg. Council, 341 U.S. 675, 684; see, also, Haleston Drug Stores v. National Labor Relations Bd., 187 F. 2d 418, cert. denied 342 U.S. 815; National Labor Rel. Bd. v. Atlanta Metallic Casket Co., 205 F. 2d 931; National Labor Relations Board v. Stoller, 207 F. 2d 305; National Labor Relations Bd. v. Guy F. Atkinson Co., 195 F. 2d 141; note, 98 L. Ed. 221.) That power necessarily includes the power to determine that the federal law shall not apply in a particular case. When it refuses to take jurisdiction in a particular case be-

cause commerce is not affected and the "*purposes* of the Act will not *be effectuated*" by assertion of jurisdiction it has said that the case is not one for the application of the federal law and the state court should not override that decision as it has done in this case. It is true that the board is given power to cede jurisdiction to a state agency by agreement with such agency over any cases in any industry even though such cases may involve labor disputes affecting interstate commerce *unless*, however, the state's applicable "statute" is "inconsistent" with the federal act. (29 U.S.C.A. §160(a).) There has been no cession here,* but the cession provision indicates that in such cases the state is in effect applying federal law because there can be no cession unless the federal and state law are consistent in both wording and interpretation. It thus may be inferred that the states are to apply the federal law only in the situation where the cession requirements are met. In other situations it is to apply its own law. When we come to the power of the federal board to refuse jurisdiction, as distinguished from cessation, we find that power is to make such refusal because the *board finds* or states "that the *policies of the Act* would not be effectuated by" the board's assertion of jurisdiction (emphasis added). (See Labor Board v. Denver Bldg. Council, *supra*, 341 U.S. 675, 684; and cases cited *supra*, together with the statement in the decision by the regional director in this particular case as to why jurisdiction was refused.) In other words the board has the power under

*We have neither statute nor agency covering the field.

its authority to refuse jurisdiction—to decide that the "policies" declared by the provisions of the federal act, shall not apply in a particular case. The board having made that determination it follows that the state court should not apply the federal act where the board has refused to act. Implicit also in the power of refusal is the board's conclusion that there is no need for uniformity of decision in order that businesses and labor in interstate commerce will be similarly treated. Moreover the board having exclusive jurisdiction generally, it also has exclusive jurisdiction to determine that interstate commerce is not sufficiently affected for the federal law to operate. The state court thus has no jurisdiction to decide to the contrary.

Thirdly, it is neither feasible nor fair to apply the federal law in this case. We have no agency such as a labor relations board in this state or anything like it. There are no facilities for conducting representation elections to determine whether a union shall be the collective bargaining agent for the employees, a question which may be basic in passing upon unfair labor practice charges. We have no body with the facilities nor expertness in the field. Our courts are at a disadvantage in sizing up the national picture—the impact upon interstate commerce—in deciding such controversies. The courts cannot make rules and regulations on the subject as may the national board. They cannot achieve the uniformity that is vital under the federal law, not having available to them, as does the national board, the nationwide circumstances.

The discrimination which results from the majority holding is manifest. An employer, although engaged in business affecting interstate commerce, yet not enough in the board's view to justify taking jurisdiction and applying the federal law, is essentially a local operator and such business should have applied to it the state law the same as its competitors whose business is purely intrastate. There is no rational basis for discriminating between the two classes of business or the employees or unions concerned. Neither has any meaningful impact on interstate commerce and thus both should be amenable to the same law—the state law governing intrastate commerce—employer-employee-union relations.

In the foregoing discussion it has been assumed that there was a refusal by the national board to take jurisdiction of the case and that such refusal is ground for saying the state court has jurisdiction. The latter question has not been settled by the United States Supreme Court. In Garner v. Teamsters Union, *supra,* 346 U.S. 485, 488, the court held, as above indicated, that the board had exclusive jurisdiction but in discussing the question, mentioned that "Nor is there any suggestion that respondents' plea of federal jurisdiction and pre-emption was frivolous and dilatory, or that the federal Board would decline to exercise its powers once its jurisdiction was invoked." In the later case of Building Trades Council *et al.* v. Kinard Construction Co., *supra,* 346 U.S. 933, the court reversed (in a memorandum opinion) the state court's (Supreme Court of Alabama) affirmance of an

injunction on the basis of the Garner case and in so doing stated: "Since there has been no clear showing that respondent has applied to the National Labor Relations Board for appropriate relief, or that it would be futile to do so, the Court does not pass upon the question suggested by the opinion below of whether the state court could grant its own relief should the Board decline to exercise its jurisdiction." It was pointed out in the decision by the Alabama Supreme Court (Kinard Const. Co. v. Building Trades Council, *supra,* 64 So. 2d 400, 402) that the board had made the general criteria statement, the same as it did here, as to the cases in which it would take jurisdiction. I interpret the Kinard case as holding, therefore, that such a general pronouncement as that made by the board here is not sufficient to show that the board would refuse to exercise jurisdiction. We have, therefore, the first question as to whether there has been a sufficient showing of refusal to exercise jurisdiction in this case, assuming such refusal would leave the matter open to state action. It would appear that there is not sufficient showing of refusal here. Although the regional director mentioned the scope of plaintiffs' business, it may well have been that his investigation revealed the facts as found by the court, that none of plaintiffs' employees desired representation by the unions and hence an election would be futile. Also the director said that no action would be taken at "this time" implying that a change of conditions might bring a different result or that the charge of an unfair labor practice, a condition the

court here found to exist, might result in board action. While it may have been that because of the smallness of the business here involved a representation election would not be ordered by the board and for the same reason a complaint for unfair labor practices would not be considered, it would appear that an effort should be made to have the board take jurisdiction of the precise question involved in the state court action, rather than the side issue of representation, before it may be said the board has refused to assume jurisdiction. That precise question is whether there has been an unfair labor practice for which a remedy may be obtained. We said in *In re* De Silva, 33 Cal. 2d 76, 78: "No distinction may be made here because the National Labor Relations Board had denied the company's petition for certification of a union representation. By the denial the board did not divest itself of jurisdiction to determine whether the defendants were committing unfair labor practices affecting interstate commerce which should be enjoined pursuant to the procedure provided by the act. Its exclusive jurisdiction over that matter had not been invoked by the plaintiffs."

Furthermore, there is also an insufficiency of a showing that the board would not act, in that, as pointed out by the regional director, plaintiffs could have appealed the dismissal of their representation petition to the national board in Washington, D.C. This they did not do. The dismissal may have been reversed. "There is no doubt that the administrative remedy is not exhausted where a party fails to appeal

from an administrative decision to a higher tribunal within the administrative machinery, or, having filed an appeal, fails to await a determination thereon before his resort to the courts." (42 Am. Jur., Public Administrative Law, §202; see, Woodward v. Broadway Fed. etc., 111 Cal. App. 2d 218; 2 Cal. Jur. 2d, Administrative Law, §187.) It is suggested, however, that an appeal would consume an amount of time that would render any remedy from the board ineffective, and that the criteria statement of the board above quoted indicates an appeal would be futile. Neither point has merit.

The delay is one of the incidents of the procedure before the board established by Congress to handle certain labor controversies. In a situation in which it was held that a federal court would not enjoin a state court from giving relief in a case under the Labor Management Relations Act and the union had to follow the state action through the state appellate procedure and then apply to the Supreme Court, the court stated in regard to the delay caused by following the state appellate procedure, "Misapplication of this Court's opinions is not confined to the state courts, nor are delays in litigation peculiar to them. To permit the federal courts to interfere, as a matter of judicial notions of policy, may add to the number of courts which pass on a controversy before the rightful forum for its settlement is established. A district court's assertion of equity power or its denial may in turn give rise to appellate review on this collateral issue. There may also be added an element of

federal-state competition and conflict which may be trusted to be exploited and to complicate, not simplify, existing difficulties." (Amalgamated Clothing Workers v. Richman Brothers, 75 S. Ct. 452, 457.)

The statement of criteria is no more reason to declare that an appeal to the board would be futile than that it makes an application to the regional director unnecessary. The same reasons, that is, that there should be a final determination by the director and board before it can be said the board has refused to exercise its jurisdiction, apply to the necessity for an appeal. The board as such has not acted until an appeal is taken and determined. The essence of state jurisdiction if the board refuses to act is an unequivocal final determination by the board that it will not act. Indeed, the board may on appeal determine that a representation election, the only thing asked by plaintiffs, is not appropriate because none of their employees belong or desire to join the union rather than that the policies of the federal law will not be effectuated by taking jurisdiction. As heretofore pointed out, the United States Supreme Court has in effect held that a general criteria statement is not enough to amount to a refusal by the board to take jurisdiction. (Building Trades Council v. Kinard Construction Co., *supra*, 346 U.S. 933.)

In the foregoing discussion I have assumed that the majority adheres to the state law as stated in Park & T. I. Corp. v. Int. etc. of Teamsters, quoted *supra*, 27 Cal. 2d 599, and the many cases there cited, and I trust there is no thought of overruling those cases

without saying so although it applies the federal law by using the ritual of unlawful purpose.* However, it is not clearly pointed out that under our law the purpose of the picketing here involved is not unlawful or that the court is applying the federal law only because interstate commerce is affected.

The judgment should be reversed.

Carter, *J.*

We concur:
Gibson, *C.J.*
Traynor, *J.*

*Picketing for an unlawful purpose may be enjoined under state law; the purpose here is unlawful under the federal law, and hence enjoinable, but is lawful under state law and therefore not enjoinable.

Appendix D

Supreme Court of the United States
October Term, 1956
No. 50

San Diego Building Trades Council, et al., Petitioners,
v. J. S. Garmon, et al.
(March 25, 1957)

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF CALIFORNIA.

Mr. Chief Justice Warren delivered the opinion of the Court.

Respondents are a partnership, operating two retail lumber yards in San Diego County, California. In the year before this proceeding began they purchased more than $250,000 worth of material from outside of California for resale at retail. Petitioner unions asked them to sign a contract including a union shop provision. Respondents refused on the ground that it would be a violation of the National Labor Relations Act to sign such a contract before a majority of their employees had selected a union as their collective bargaining agent. The unions commenced peaceful picketing to enforce their demand. About a week later respondents filed suit in the Superior Court for an injunction and damages, alleging that they were in interstate commerce and that the contract sought by the unions would violate the Act.[1] On the same day respond-

[1]Section 8(a)(3) allows an employer to enter into a union security agreement of the type petitioners here were seeking only if the union is the bargaining representative of his employees. 61 Stat. 140, 29 U.S.C. Section 158(a)(3).

ents filed with the National Labor Relations Board's regional office a petition asking that the question of the representation of its employees be resolved. The Regional Director dismissed the petition. The unions nevertheless pressed their claims that the National Board had exclusive jurisdiction.[2] After a hearing the Superior Court entered an order enjoining the unions from picketing or exerting secondary pressure in support of their demand for a union shop agreement unless and until one or another of the unions had been designated as the collective bargaining representative of respondents' employees. It also awarded respondents $1,000 damages. The California Supreme Court affirmed.[3] Recognizing that respondents' business affected interstate commerce, it concluded that the Board's declination, in pursuance of its announced jurisdictional policy, to handle respondents' representation petition left the state courts free to act.[4] On the merits the court said:

> "The assertion of economic pressure to compel an employer to sign the type of agreement here involved is an unfair labor practice under section 8(b)(2) of the (National Labor Relations) act. . . . Concerted activities for such a purpose thus were unlawful under the federal statute, and for

[2] They also maintained that by not appealing the regional director's decision respondents had failed to exhaust their remedies under the National Act. On our view of the case, we need not consider this contention.

[3] 45 Cal. 2d 657, 291 P. 2d 1.

[4] Petitioners' interstate purchases fall below the standards for retail stores. See Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 23, 77 S. Ct. 605, n. 4. The Board draws no distinction in the application of its jurisdictional standards between representation and unfair labor practice cases. C. A. Braukman, 94 N.L.R.B. 1609, 1611.

that reason were not privileged under the California law."[5]

What we have said in Guss v. Utah Labor Relations Board, 353 U.S. 1, 77 S.Ct. 598, and Amalgamated Meat Cutters v. Fairlawn Meats, Inc., 353 U.S. 20, 77 S.Ct. 604, is applicable here, and those cases control this one in its major aspects. Respondents, however, argue that the award of damages must be sustained under United Construction Workers v. Laburnum Construction Corp., 347 U.S. 656. We do not reach this question. The California Supreme Court leaves us in doubt, but its opinion indicates that it felt bound to "apply" or in some sense follow federal law in this case. There is, of course, no such compulsion. Laburnum sustained an award of damages under state tort law for violent conduct. We cannot know that the California court would have interpreted its own state law to allow an award of damages in this different situation. We therefore vacate the judgment and remand the case to the Supreme Court of California for procedings not inconsistent with this opinion and the opinions in Guss v. Utah Labor Relations Board, supra, and Amalgamated Meat Cutters v. Fairlawn Meats, Inc., supra.

Vacated and remanded.

Mr. Justice Whittaker took no part in the consideration or decision of this case.

(See dissent in #280)

[5] 45 Cal. 2d, at 666; 291 P. 2d, at 7.

Appendix E

In the Supreme Court of the State of California
[L. A. No. 23005. In Bank. Jan. 16, 1958.]

J. S. Garman et al., Respondents, v. San Diego Building Trades Council, et al., Appellants.

Appeal from a judgment of the Superior Court of San Diego County. John A. Hewicker, Judge. Affirmed in part and reversed in part.

Action against unions to enjoin picketing and to recover damages. Judgment for plaintiffs reversed insofar as it awarded injunctive relief, and affirmed insofar as it awarded damages.

Todd & Todd, Thomas Whelan, John T. Holt, Clarence E. Todd, Walter Wencke, Charles P. Scully, John C. Stevenson, Mathew Tobriner and Charles Hackler for Appellants.

Gray, Cary, Ames & Frye, James W. Archer and Ward W. Waddell, Jr. for Respondents.

Filed January 16, 1958.

Majority Opinion

This case is here for the second time. The first was on appeal from a judgment of the Superior Court in and for the County of San Diego ordering an injunction to prevent continuing conduct of the defendants found by the court to have been the cause of irreparable damage to the property and rights of the plaintiffs, and awarding $1,000 damages resulting from alleged past tortious activities of the defendants.

The judgment was affirmed by this court on December 2, 1955. (*Garmon v. San Diego Bldg. Trades Council*, 45 Cal.2d 657 [291 P.2d 1].) On certiorari the Supreme Court of the United States ordered that the judgment of this court be "vacated" and the cause be remanded "for proceedings not inconsistent with this opinion and the opinions in *Guss v. Utah Labor Relations Board, supra* [353 U.S. 1 (77 S.Ct. 598, 1 L.Ed.2d 601)], and *Amalgamated Meat Cutters v. Fairlawn Meats, Inc., supra* [353 U.S. 20 (77 S.Ct. 604, 1 L.Ed.2d 613)]. (*San Diego Building Trades Council v. J. S. Garmon*, 353 U.S. 26 [77 S.Ct. 607, 1 L.Ed.2d 618].)

Both the Guss case (*Guss v. Utah Labor Relations Board*, 353 U.S. 1 [77 S.Ct. 598, 1 L.Ed.2d 601]) and the Amalgamated Meat Cutters case (*Amalgamated Meat Cutters v. Fairlawn Meats*, 353 U.S. 20 [77 S. Ct. 604, 1 L.Ed.2d 613]) were decided concurrently with the present case, March 25, 1957. They involved the exercise of jurisdiction by state agencies over labor disputes which substantially affected interstate commerce within the cognizance of the National Labor Relations Act. In the Guss case the Supreme Court held that the Utah Labor Relations Board had no jurisdiction to resolve a charge of unfair labor practice against an employer when the National Labor Relations Board had refused jurisdiction on the ground that the employer's operations were "predominately local in character." The court stated at page 602 that "the proviso to § 10(a) [formal cession of power to state agencies] is the exclusive means whereby States may be enabled to act concerning the

matters which Congress has entrusted to the National Labor Relations Board." In the Amalgamated Meat Cutters case the Ohio court of Common Pleas asserted jurisdiction in a labor dispute, and the Supreme Court stated at page 606 that "If the proviso to § 10(a) . . . operates to exclude state labor boards from disputes within the National Board's jurisdiction in the absence of a cession agreement, it must also exclude state courts." In order that the present disposition of this case conform to the decision and order of the Supreme Court it is obvious that the judgment of the trial court herein, insofar as injunctive relief is concerned, must be reversed. In doing so it is deemed desirable if not necessary to review to some considerable extent what has taken place in the present proceeding.

As to the facts it appears that the plaintiffs are partners engaged in interstate commerce as retail dealers in lumber and other building materials; that their employees are not members of a labor union and had indicated that they do not desire to join, or to be represented by, a union; that the defendant unions had not been recognized by the plaintiffs nor certified by the National Labor Relations Board as the representatives of the plaintiffs' employees; that nevertheless the defendants demanded that the plaintiffs enter into an agreement which would require that all of the plaintiffs' employees be or become members of the defendant unions; that upon the plaintiffs' refusal to enter into such an agreement, on the ground that to do so would violate the law, the defendants placed pickets at the plaintiffs' place of business, had the plaintiffs'

trucks followed, threatened persons about to enter the plaintiffs' place of business with economic interference and injury, and that by such conduct they induced building contractors to discontinue their patronage.

The plaintiffs filed a petition with the National Labor Relations Board requesting that the question of its employee representation be resolved. The board refused to take jurisdiction. The refusal was based on the board's declared policy that the annual dollar amount of the plaintiffs' interstate business must but did not exceed a minimum set by the board. The present proceeding was commenced in the superior court for an injunction to prevent further alleged tortious conduct on the part of the defendants and for damages. The court found on substantial evidence that the intent of the defendants was not to induce the employees to join one of their unions, nor to provide education or information as to the benefits of organized representation; that their only purpose was to compel the plaintiffs to execute the agreement or to suffer the destruction of their business. The court enjoined the unions ". . . from picketing the places of business of plaintiffs, from following the trucks of the plaintiffs, from preventing or attempting to prevent, by means of threats, expressed or implied, persons having business with the plaintiffs from entering the premises of the plaintiffs, from inducing or attempting to induce by such means potential customers of plaintiffs to refuse to purchase from plaintiffs or to refuse to accept delivery of goods from plaintiffs or in plaintiffs' trucks, and from doing any other

acts tending or intended to injure plaintiffs' business. . . ." The court also found that the plaintiffs' business had been damaged to the extent of $1,000 by the defendants' conduct and as stated, rendered judgment for that amount.

In affirming the judgment this court held that the National Labor Relations Board had jurisdiction to prevent unfair labor practices against employers engaged in interstate commerce; that the conduct on the part of the unions constituted unfair labor practices within the meaning of the Labor Management Relations Act (29 U.S.C., § 158); that in vesting in the National Labor Relations Board the discretion to accept or refuse jurisdiction of a controversy under section 10 of the act Congress must have intended that state courts should be free to act where the board had specifically determined, by refusing to accept jurisdiction, that the controversy did not have a pronounced impact on interstate commerce; that although section 10(a) of the Taft-Hartley Act made provision for the National Labor Relations Board to cede, by agreement, jurisdiction to state agencies where the state law is not inconsistent with the national labor policy, Congress had not, by implication or otherwise, prohibited the state from assuming jurisdiction in the absence of such a cession and where the National Labor Relations Board had refused to take jurisdiction, and that the plaintiffs were entitled to injunctive relief and to the damages awarded by the state court.

In arriving at the foregoing conclusions this court took into consideration the fact appearing in the record that in the administration of the National Labor

Relations Act the board had established certain standards as prerequisites to its assumption of jurisdiction. One essential was, of course, that the business of the enterprise must affect interstate commerce in a substantial way. But even when so affected the board's announced policy, for budgetary or other reasons, caused it to refuse jurisdiction in certain cases. This policy was declared by the board in its public announcement of October 6, 1950, that in order ". . . to better effectuate the purpose of the Act, and promote the prompt handling of major cases [the Board] has decided not to exercise its jurisdiction to the fullest extent possible under the Authority delegated to it by Congress, but to limit that exercise to enterprises whose operations have, or at which labor disputes would have, a pronounced impact upon the interstate flow of commerce wherever federal jurisdiction exists under the statute and the interstate commerce clause of the Constitution. . . ." Among the enterprises excluded were those which did not have a "direct inflow of material valued at $500,000 a year" or an "indirect inflow of material valued at $1,000,000 a year." (26 Labor Relations Reference Manual 50.)

The foregoing requirements were not altered by the board in a 1954 revision of its standards (34 Labor Relations Reference Manual 75) and were in force at the time of filing the plaintiffs' complaint. Pursuant to the standards set by those rules the remedy sought by the plaintiffs was excluded from consideration by the board for the reason that only $250,000 of the plaintiffs' required business during the preceding

year was in interstate commerce. The plaintiffs were thus denied any redress before the board and were so notified. When the plaintiffs filed their petition with the board they received a reply stating: "The amount of business by Valley Lumber Company [the plaintiffs' business title] in interstate commerce is insufficient for the Board to assert jurisdiction on the basis of present Board decisions." Later on, after investigation by the regional director of the board, the plaintiffs were notified that their petition had been dismissed with the statement that "in view of the scope of the business operation involved, it would not effectuate the purposes of the National Labor Relations Act to institute further proceedings at this time . . ."

The present situation of the plaintiffs therefore appears to be about this: Being in a business affecting interstate commerce their remedy by way of injunction is relegated to federal law and relief. Because their business in that category does not amount to $500,000 per annum they are caught in the vacuum. No federal judicial relief can be granted and in this "no man's land" no equitable relief can be granted by a state court. This unfortunate state of the law is recognized by the Supreme Court in both the majority and dissenting opinions in the Guss case. It is variously referred to as a "vacuum" or "twilight zone" or a "no man's land" in the law on account of which parties engaged in interstate commerce in a substantial amount but below the standards established by the board may not obtain equitable relief in state

courts or other relief from the National Labor Relations Board however disastrously the alleged tortious conduct of the defendants may affect the plaintiffs' business.

We are, therefore, bound to conclude from the decisions of the Supreme Court that the plaintiffs are without equitable relief under federal law because Congress has occupied the field and, although the federal agency set up to adjust the controversy has failed to act, the state courts have no power to do so. In this connection the Supreme Court declared in the Guss case that the function of filling the gap, insofar as injunctive relief is concerned, is not judicial but legislative and must be performed by congressional enactment.

Whether the national board has the power to disclaim jurisdiction by a declaration of its policy appears not to have been judicially determined. The question was referred to in the Guss case by quoting from *Bethlehem Steel Co. v. New York Labor Relations Board,* 330 U.S. 767 at page 776 [67 S.Ct. 1026, 91 L.Ed. 1234] as follows: "The election of the National Board to decline jurisdiction in certain types of cases, for budgetary or other reasons presents a different problem which we do not now decide."

We turn now to the question of damages awarded by the trial court. In remanding the present case the Supreme Court stated: "Respondents, however, argue that the award of damages must be sustained under *United Construction Workers v. Laburnum Construction Corp.,* 347 U.S. 656 [74 S.Ct. 833, 98 L.Ed. 1025].

We do not reach this question. The California Supreme Court leaves us in doubt, but its opinion indicates that it felt bound to 'apply' or in some sense follow federal law in this case. There is, of course, no such compulsion. Laburnum sustained an award of damages under state tort law for violent conduct. We cannot know that the California court would have interpreted its own state law to allow an award of damages in this different situation." The "different situation" referred to would seem to pose the question: Would this court interpret the California law to authorize an action for damages for the alleged unlawful tortious conduct of the defendants in the absence of violence? This question calls for an examination of the approach to the problem resulting in our former decision. From that examination it may be said that both the state and federal laws were relied on as establishing actionable conduct. Any distinction as between those laws was not thoroughly explored. It now appears that any reliance on federal law to justify the award for damages is not tenable under the facts of this case and we should now proceed to determine whether the plaintiffs have stated a cause of action for damages on account of the alleged past activities on the part of the defendants under state law.

It is apparent from the announcements of the Supreme Court as to the limitations on the jurisdiction of a state court to grant equitable relief in the solution of labor disputes that such courts are not foreclosed from asserting jurisdiction in an action for damages resulting from the tortious conduct of those

engaged in the dispute. If the court had concluded that jurisdiction to award damages had been preempted by congressional legislation undoubtedly a declaration to that effect would have been forthcoming. In determining the jurisdiction intended by Congress to vest in the National Labor Relations Board the Supreme Court stated in *Garner v. Teamsters etc. Union,* 346 U.S. 485, at page 488 [74 S.Ct. 161, 98 L.Ed. 228]: "The National Labor Management Relations Act, as we have before pointed out, leaves much to the states, though Congress has refrained from telling us how much." In view of the decisions of the Supreme Court holding that state agencies and courts lack the jurisdiction to grant injunctive relief under any circumstances in interstate commerce cases, there would seem to be nothing left to the states if their courts are also prohibited from making an award for damages in a proper case.

In those cases where the Supreme Court has held that exclusive jurisdiction is vested in the National Labor Relations Board it appears without question that the basis of the decisions is the desirability of avoiding such a conflict between state and federal policies and procedural remedies as would result in an interference with uniform enforcement of the federal act. In *Garner v. Teamsters etc. Union, supra,* 346 U.S. 485, the court held at page 490 that Congress considered that centralization was necessary "to obtain uniform application of its substantive rules and to avoid these diversities and conflicts likely to result from a variety of local procedures. . . ." The Garner

case involved injunctive relief only. In the Laburnum case (*United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 [74 S. Ct. 833, 98 L.Ed. 1025]) the action was one for compensatory and punitive damages arising out of unfair labor practices amounting to tortious conduct. As to the nature of the conduct there involved it appeared that agents of the labor unions "threatened and intimidated respondent's officers and employees with violence to such a degree that respondent was compelled to abandon all its projects in that area." After the Virginia Supreme Court of Appeals affirmed a modified judgment for damages the United States Supreme Court granted certiorari limited to the following question: ". . . does the National Labor Relations Board have exclusive jurisdiction over the subject matter so as to preclude the State Court from hearing and determining the issues in a common-law tort action based upon this conduct?" The petitioners contended in reliance on the Garner case that the federal government occupied the field so completely that state courts were "excluded not only from enjoining future unfair labor practices . . . but that state courts are excluded also from entertaining common-law tort actions for the recovery of damages caused by such conduct." The Supreme Court rejected this argument and distinguished the Garner case on the ground that the federal legislation was not applicable to damages for tortious conduct and that no interference with national policy could arise. The court stated: "In the Garner case, Congress had provided a federal administrative rem-

edy, supplemented by judicial procedure for its enforcement, with which the state injunctive procedure conflicted. Here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct. For us to cut off the injured respondent from this right of recovery will deprive it of its property without recourse or compensation. To do so will, in effect, grant petitioners immunity from liability for their tortious conduct. We see no substantial reason for reaching such a result. The contrary view is consistent with the language of the Act and there is positive support for it in our decisions and in the legislative history of the Act." The court then further commented on its decision in the Garner case as follows: "To the extent that Congress prescribed preventive procedure against unfair labor practices, that case recognized that the Act excluded conflicting state procedure to the same end. To the extent, however, that Congress has not prescribed procedure for dealing with the consequences of tortious conduct already committed, there is no ground for concluding that existing criminal penalties or liabilities for tortious conduct have been eliminated. The care we took in the Garner case to demonstrate the existing conflict between state and federal administrative remedies in that case was, itself, a recognition that if no conflict had existed, the state procedure would have survived. The primarily private nature of claims for damages under state law also distinguishes them in a measure from the public

nature of the regulation of future labor relations under federal law."

It is significant that the basis for the decision in the Laburnum case is that the remedy in damages for tortious conduct there involved did not conflict with federal legislation. It would seem necessarily to follow that the same conclusion would be reached in the case of an action for damages for any other tortious conduct which did not so conflict. The fact that the particular tort in the Laburnum case was said to be a common-law tort, or one involving physical violence, is, of itself, not controlling. To confine the Laburnum case to its own facts would be to completely ignore the rationale of the decision. It would require also that we ignore the language by which the present case was remanded for reconsideration. The Supreme Court, after stating that "Laburnum was an award of damages under state tort law for violent conduct," then invited this court to examine its state law to determine whether a cause of action for damages in tort could be maintained under that law in a situation which the Supreme Court referred to as "different." Certainly we cannot now refuse to apply our law merely because of the suggested difference. Again, if it had been the intent of the Supreme Court to limit jurisdiction to torts of violence an order of reversal and not an order of remand would also seem to have been appropriate as the record which that court had before it was devoid of any evidence of physical violence on the part of the defendants.

In considering the effect of the Laburnum case we are not alone in concluding that it is not to be confined to picketing accompanied by acts of violence. Following that decision a number of federal and state courts have affirmed judgments for damages in cases of tortious conduct differing from that in the Laburnum case but well within the rationale of that case. Most significant are those cases wherein, like the present one, only peaceful picketing was involved. In *Denver etc. Council v. Shore,* 132 Colo. 187 [287 P. 2d 267], it was claimed that the Laburnum case was distinguishable on the ground that violence was there involved. The Colorado Supreme Court held that this "is scarcely a proper basis for distinction as it goes not to the principle involved, but only to the extent of damage that might be properly determinable. Admitting that in the Laburnum case the tort was excessive and that in the present case it was mild and devoid of any rowdyism, nevertheless, in either case a recovery in damages for injury done on account of the illegal practice is necessarily upon the basis of tort." (See also *Benz v. Compania Naviera Hidalgo, S. A.,* 353 U.S. 138 [77 S.Ct. 699, 1 L.Ed.2d 709]; *Dallas General Drivers v. Wamix, Inc., of Dallas,* (Tex.Civ. App.) 281 S.W.2d 738, 745; *Benjamin v. Foidl,* 379 Pa. 540 [109 A.2d 300, 301]; *International Sound Technicians v. Superior Court,* 141 Cal.App.2d 23 [296 P.2d 395]; *Selchow & Righter Co. v. Damino,* 146 N.Y.S.2d 874.)

In accordance with the views expressed by the Supreme Court in the Laburnum case, and the court's

reference thereto in remanding the present case, the question next for consideration is whether the alleged conduct of the defendants was unlawful under the laws of this state and an actionable tort within the jurisdiction of its courts. If the purpose of the defendants' picketing was unlawful under the state law, the case cannot be distinguished from the Laburnum case and the other state and federal cases to the same effect as to the jurisdictional issue.

The law of this state imposes upon everyone the duty "to abstain from injuring the person or property of another, or infringing upon any of his rights." (Civ. Code, § 1708.) There is a breach of such legal duty when one who performs an act not authorized by law infringes upon a right another is entitled to enjoy; or causes a substantial material loss to another. That breach constitutes the commission of a tort, under the laws of this state, for which an action in damages will lie. In *Loup v. California S. R. R. Co.*, 63 Cal. 97, it was said at page 99: "A person commits a tort, and renders himself liable to an action for damages, who commits some act not authorized by law, or who omits to do something which he ought to do by law, and by such an act or omission either infringes some absolute right, to the enjoyment of which another is entitled, or causes to such other some substantial loss of money, health, or material comfort." (See also 24 Cal.Jur. 589.) It is further established in this state that by an unlawful and unauthorized labor practice an employer who is damaged thereby may recover damages in a tort action. In *James v.*

Marinship Corp., 25 Cal.2d 721 [155 P.2d 329, 160 A.L.R. 900], it was said that the "object of concerted labor activity must be proper, and that it must be sought by lawful means, otherwise the persons injured . . . may obtain damages . . . (Citations.)" (See also *Park & T. I. Corp. v. International etc. of Teamsters*, 27 Cal.2d 599, 603 [165 P.2d 891, 162 A.L.R. 1426].)

There is then the further question whether the objective of the defendant unions was a proper and lawful one. Section 923 of the Labor Code, as enacted in 1933 (Stats. 1933, p. 1478) and reenacted in 1937 (Stats. 1937, p. 208), provides as follows: "In the interpretation and application of this chapter, the public policy of this State is declared as follows: Negotiations of terms and conditions of labor should result from voluntary agreement between employer and employees. . . . [I]t is necessary that the individual workman have full freedom of association, self-organization, and designation of representatives of his own choosing, to negotiate the terms and conditions of his employment, and that he shall be free from the interference, restraint, or coercion of employers of labor, or their agents, in the designation of such representatives or in self-organization or in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 1667 of the Civil Code, enacted in 1872, provides: "That is not lawful which is: . . . Contrary to the policy of express law though not expressly prohibited. . . ." In the present case the court found, in accordance with the allegations of the complaint, that

in order to achieve an unlawful objective the defendants had made a demand on the plaintiffs that they execute the contract and concluded that the demand, if complied with, would constitute an unlawful interference with the bargaining rights of the plaintiffs' employees. Such conduct on the part of the defendant was directly contrary to the policy of the state as set forth in section 923 of the Labor Code above quoted. The trial court correctly concluded from the evidence that by their demand the defendants sought to require the plaintiffs to interfere with the bargaining rights of their employees and force upon them terms and conditions of their employment and labor representation not of their own choosing and which in fact they had rejected. If the plaintiffs had acceded to the demand of the defendants a definite case of coercion on the part of the plaintiffs with respect to the bargaining rights of their employees, contrary to law, would have been accomplished.

After the decision of this court in *McKay v. Retail Auto. S. L. Union No. 1067,* 16 Cal.2d 311 [106 P.2d 373], the Legislature in 1947 enacted the Jurisdictional Strike Act. (Stats. 1947, pp. 2952-53.) That enactment is incorporated in the Labor Code as sections 1115 to 1120 inclusive. Section 1118 defines a jurisdictional strike not only as a "concerted refusal to perform work for an employer" but also as "any other concerted interference with an employer's operation or business, arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to bargain col-

lectively with an employer on behalf of his employees or any of them, or arising out of a controversy between two or more labor organizations as to which of them has or should have the exclusive right to have its members perform work for an employer." Section 1115 states that a jurisdictional strike "as herein defined is hereby declared to be against the public policy of the State of California and is hereby declared to be unlawful." Section 1116 provides that "any person injured or threatened with injury by violation of any of the provisions hereof shall be entitled to injunctive relief therefrom in a proper case and to recover any damages resulting therefrom in any court of competent jurisdiction."* Section 1117 defines a "Labor organization" as "any agency or employee representation committee or any local unit thereof in which employees participate, and exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, hours of employment or conditions of work. . . . As used herein, 'person' means any person, association, organization, partnership, corporation, unincorporated association, or labor organization." In the present case it does not

*Federal legislation to the same effect is found in section 303 (a)(4) (29 U.S.C.A., § 187[a][4] of the Labor Management Relations Act (61 Stat. 158) prohibiting jurisdictional strikes, and section 303(b) (29 U.S.C.A., § 187[b]) authorizes an action for damages for violation thereof. A judgment for damages for violation of that provision was rendered by the District Court for the Territory of Alaska, affirmed by the Court of Appeals for the Ninth Circuit (*International Longshoremen's, etc. Union v. Juneau Spruce Corp.*, 189 F.2d 177), and affirmed by the Supreme Court in 1952 (*International Longshoremen's etc. Union v. Juneau Spruce Corp.*, 342 U.S. 237 [72 S.Ct. 235, 96 L.Ed. 275]).

appear clearly whether the plaintiffs' employees had or had not selected a committee or unit or other agency for the purpose of collective bargaining. However, it does appear that they preferred to deal directly with their employers pursuant to their individual bargaining rights. If they had exercised their rights under the law and chosen to deal with their employers through some committee or organization they would have come directly within the provisions of the Jurisdictional Strike Act.

The foregoing provisions of the Labor Code, that is, section 923 and 1115 through 1118, are *in pari materia* in that they relate to the same general subject and should be considered together. They all represent an endeavor on the part of the Legislature to safeguard the rights of the individual workman and the employer in this important field of labor-management relationships.

The question of the constitutionality of the provisions of the Jurisdictional Strike Act came before this court in *Seven Up etc. Co. v. Grocery etc. Union* (1953), 40 Cal.2d 368 [254 P.2d 544, 33 A.L.R.2d 327]. By the complaint the plaintiff sought an injunction and damages for the alleged unlawful conduct of the defendants. At the trial the defendants objected to the introduction of any evidence on the ground that the complaint did not state facts sufficient to constitute a cause of action. The objection was sustained and from a judgment dismissing the action an appeal was taken. It was contended by the defendant unions that the act was unconstitutional on the ground that under the

guaranties of freedom of speech "the picketing was lawful, and the act, therefore, in condemning concerted interference with the employer's business, is invalid, because it deprives them of the right to engage in lawful concerted action, that is, peaceful picketing; that such activity does not create a 'clear and present danger' justifying a restraint on the freedoms mentioned."

By unanimous opinion of this court it was held that the legislation under attack did not infringe upon the constitutional rights of free speech. There was no allegation in the complaint that interstate commerce was involved. It was pointed out that although "Peaceful picketing has been identified with freedom of speech—a means by which the pickets communicate to others the existence of a labor controversy," nevertheless the identification of peaceful picketing with freedom of speech did "not free the concerted activity of picketing from all restraint." (See also *Northwestern Pac. R. R. Co. v. Lumber & S. W. Union*, 31 Cal. 2d 441 [189 P.2d 277].)

Based on the foregoing provisions of the statutory law of this state and the finding and conclusion of the trial court, which is amply supported by the evidence, that the only purpose of the defendants' activities was to compel the plaintiffs to execute the proposed agreement, we are bound to conclude that the conduct of the defendants constituted an unlawful labor practice contrary to and in violation of the laws of this state.

Apart from the question of the existence of an actionable tort based upon an unlawful labor practice

under state law is the question whether any limitation placed on peaceful picketing constitutes an undue interference with personal liberties protected by the First and Fourteenth Amendments. After the decisions of the Supreme Court in the Giboney case, in the Amalgamated Meat Cutters case, and in this case, all on March 25, 1957, the Supreme Court in *International Brotherhood of Teamsters v. Vogt, Inc.*, 354 U.S. 284 [77 S.Ct. 1166, 1 L.Ed.2d 1347] (June 17, 1957) entered upon an extensive review of its decisions involving peaceful picketing. It was there said at page 1166: "This is one more in the long series of cases in which this Court has been required to consider the limits imposed by the Fourteenth Amendment on the power of a State to enjoin picketing." After reviewing those cases the court stated at page 1171: "This series of cases, then, established a broad field in which a State, in enforcing some public policy, whether of its criminal or its civil law, and whether announced by its legislature or its courts, could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy." Among those local policies which the court deemed to be proper objectives for state action was that which, as in the present case, made it unlawful to coerce an employer to put pressure on his employees to join a particular union. The court commented on *Pappas v. Stacey*, 151 Me. 36 [116 A.2d 497], where it appeared that union employees picketed a restaurant peacefully "for the sole purpose of seeking to organize other employees of the Plaintiff; ultimately to have the Plaintiff enter into collective bar-

gaining and negotiations with the Union. . . ." The Maine Supreme Judicial Court had drawn an inference from an agreed statement of facts that "there is a steady and exacting pressure upon the employer to interfere with the free choice of the employees in the matter of organization. To say that the picketing is not designed to bring about such action is to forget an obvious purpose of picketing—to cause economic loss to the business during noncompliance by the employees with the requests of the union." The trial court held the conduct to be in violation of a Maine statute which provided as follows: "Workers shall have full freedom of association, self organization and designation of representatives of their own choosing for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection, free from interference, restraint or coercion by their employers or other persons. . . ." (P.L. 1941, ch. 292; R.S., ch. 30, § 15 (1954).) The United States Supreme Court dismissed an appeal in the Stacey case because it presented no substantial federal question. (*Stacey v. Pappas*, 350 U.S. 870 [76 S.Ct. 117, 100 L.Ed. 770].) The Vogt case presented a similar problem and while the Supreme Court said that it "might well have denied certiorari on the strength of our decision" in the Stacey case it nevertheless "thought it advisable to grant certiorari . . . and to restate the principles governing this type of case."

In the Vogt case, as in the Stacey case, the problem involved pressure brought to bear against an employer through peaceful picketing in an attempt to coerce

him to influence his employees to join a labor organization. The Supreme Court of Wisconsin had stated that "One would be credulous indeed to believe under the circumstances that the Union had no thought of coercing the employer to interfere with its employees in their right to join or refuse to join the defendant Union." As in the Stacey case the Wisconsin court held that such picketing was for an unlawful purpose and in violation of a Wisconsin statute which made it an unlawful labor practice for an employee individually or in concert with others to "coerce, intimidate or induce any employer to interfere with any of his employes in the enjoyment of their legal rights . . . or to engage in any practice with regard to his employes which would constitute an unfair labor practice if undertaken by him on his own initiative." (Wis. Stat., § 111.06(2) (b).) In the Vogt case the Supreme Court, again referring to the Stacey case said: "The Stacey case is this case . . . As in Stacey, the highest state court [of Wisconsin] drew the inference from the facts that the picketing was to coerce the employer to put pressure on his employees to join the union, in violation of the declared policy of the State. (For a declaration of similar congressional policy, see § 8 of the Taft-Hartley Act, 61 Stat. 140, 29 U.S.C. § 158, 29 U.S.C.A. § 158.) The cases discussed above all hold that, consistent with the Fourteenth Amendment, a State may enjoin such conduct." (See also *United Assn. of Plumbers etc. Union v. Graham*, 345 U.S. 192 [73 S.Ct. 585, 97 L.Ed. 946]; *Building Service etc. Union v. Gazzam*, 339 U.S. 532 [70 S.Ct. 784, 94 L.Ed. 1045].)

The present case is the same in all essential respects as the Stacey and Vogt cases, with the single exception that in those cases interstate commerce was not involved and thus the question of encroachment on the jurisdiction of the National Labor Relations Board was not at issue. However, those considerations which go to the existence of a cause of action for tortious conduct in violation of the declared policy of a state are the same. Not only are the declared policies of Maine and Wisconsin identical in all material aspects with the law of California, but the manner in which those laws were violated and thus gave rise to an actionable tort cannot be distinguished.

The United States Supreme Court, in its majority opinion in the Vogt case, pointed out that there had thus been a gradual transition from the premise that peaceful picketing was an absolute right (see *Thornhill v. Alabama* (1939), 310 U.S. 88 [60 S.Ct. 736, 84 L.Ed. 1093]), and that it is now universally recognized that there is something more in peaceful picketing than merely the communication of ideas or free speech entitled without qualification to First Amendment protection. (See *Bakery & P. Drivers etc. Local v. Wohl*, 315 U.S. 769, 776-777 [62 S.Ct. 816, 86 L. Ed. 1178].) The court in the Vogt case noted that the cases in this field disclosed "an evolving, not a static, course of decision," and that the doctrine of a particular case "is not allowed to end with its enunciation. . . ." It traced the evolution of the law in this field from the Thornhill case which had been deemed to accord to peaceful picketing unqualified First Amendment pro-

tection, to its present holding that the intervening cases "established a broad field in which a State, in enforcing some public policy . . . could constitutionally enjoin peaceful picketing aimed at preventing effectuation of that policy."

Mr. Justice Douglas in the dissenting opinion in the Vogt case summarized the evolution of the court's decisions dealing with the legal principles here involved since the Thornhill case. In criticizing the majority opinion he said that "The Court has now come full circle"; that the "retreat began when, in *International Brotherhood of Teamsters, C. W. & H. Union v. Hanke,* 339 U.S. 470 [70 S.Ct. 773, 94 L.Ed. 995, 13 A.L.R.2d 631], four members of the Court announced that all picketing could be prohibited if a state court decided that that picketing violated the State's public policy. The retreat became a rout in *Local Union No. 10, United Asso. J. P. & S. v. Graham,* 345 U.S. 192 [73 S.Ct. 585, 97 L. Ed. 946]. It was only the 'purpose' of the picketing which was relevant. . . . Today, the Court signs a formal surrender . . . State courts and state legislatures are free to decide whether to permit or suppress any particular picket line for any reason other than a blanket policy against all picketing."

The majority of the Supreme Court by its latest decisions has thus defined and clarified the limitations which a state may constitutionally place upon peaceful picketing conducted in the asserted exercise of the right of free speech as contemplated by the First and Fourteenth Amendments. That court has unequivocally held that there may be something more in peace-

ful picketing than free speech, depending on the facts of the case, and that conduct in the exercise of the asserted right is subject to regulation in accordance with a valid state policy in cases where interstate commerce is not involved.

In view of the development and recent clarification of the law in this field we are requested to reconsider the case of *McKay v. Retail Auto. S. L. Union No. 1067, supra,* 16 Cal.2d 311. That case in legal contemplation is similar to the present case but there was no showing there that the employer corporation was engaged in interstate commerce and there was no request for damages. It appeared, however, that the controversy was between two labor organizations as to which had "or should have the exclusive right to have its members perform work for an employer." (Lab. Code, § 1118.) The picketing was peaceful. The employer took no part in the controversy. It could not, under the law, interfere. It was caught in the middle and according to the admitted facts "the continuance of the picket lines [had] the effect of closing down the company's plant, stopping all work therein and destroying its said business."

The McKay case was decided on October 14, 1940. It was held that the picketing without violence there engaged in was entitled to protection under the federal constitutional right of freedom of speech. This declaration was made notwithstanding the provisions of section 923 of the Labor Code, adopted in 1933, declaring the policy of the state and above quoted. That section was referred to in the majority opinion

but only as to its ineffectiveness as against the constitutional rights of the defendants.

We deem it unnecessary to reconsider the McKay case for the reason that the result sought by the request has already been accomplished, first, by the enactment by the Legislature of the Jurisdictional Strike Act in 1947 making the activities of the defendants in the McKay case unlawful with redress by way of injunctive relief and damages; secondly by the decision of this court in the first Seven Up case in 1953 (*Seven Up etc. Co. v. Grocery etc. Union, supra,* 40 Cal.2d 368) establishing the constitutionality of that act as valid state law, and finally by the Supreme Court of the United States in the Vogt case (*International Brotherhood of Teamsters v. Vogt, Inc.* [June, 1957], *supra,* 77 S.Ct. 1166) in affirming jurisdiction in the state court to enforce such a state policy either by injunction or damages, or both, when interstate commerce is not involved. The McKay case, on its facts, would fall within the regulatory provisions of the Jurisdictional Strike Act, later enacted. It was undisputed in that case that the controversy was between two labor organizations. The effect of later statutes and decisions on that case may well be left for further judicial consideration when the same or similar facts are presented.

It would also serve no useful purpose to review the numerous other decisions of this court cited by the parties and prior to the latest expressions of the Supreme Court of the United States in clarifying the decisional and other law in this field of labor-manage-

ment relations, and in making clear the extent of the power of the state courts to exercise jurisdiction in proper cases, both in law and in equity. Those decisions have been superseded, in many respects, by later law both statutory and decisional. To engage in the task of distinguishing and discussing them now would be a work of supererogation. Whether they are or are not consistent with present law may also be more appropriately pointed out as questions with reference thereto are presented.

The defendants contend that the trial court was without jurisdiction to award damages in this case for the reason that the amount of the damages alleged and awarded was less than the amount necessary to confer superior court jurisdiction. The complaint alleged past damages in the sum of $750 and future damages in the sum of $150 a day in addition to the loss of contracts. Irreparable injury was alleged. Both injunctive relief and damages in the sum of $1,000 were awarded. The court correctly assumed jurisdiction to hear and decide the case as to both issues. The fact that equitable relief is ultimately denied does not destroy the judgment as to the award of damages even though the award was below the jurisdictional amount otherwise necessary. In *Silverman v. Greenberg*, 12 Cal.2d 252, it was said at page 254 [83 P.2d 293]: "The allegations of the pleading and the relief sought established the character of the action. The fact that it was substantially of an equitable as well as of a legal nature invested the superior court with jurisdiction to hear and determine the entire cause, and that

jurisdiction was not divested by the subsequent denial of equitable relief. The court of equity having once obtained jurisdiction, properly retained the case and decided the whole controversy between the parties. For a complete discussion of this subject see *Becker v. Superior Court, supra* [151 Cal. 313 (90 P. 689)]; also *Cook v. Winklepleck, supra,* [16 Cal.App.2d Supp. 759, 763 (59 P.2d 463)] and cases there cited."

There is substantial evidence to support the amount of damages awarded.

In summary, it is concluded that the injunctive relief sought by the plaintiffs is not, under the facts of this case, within the jurisdiction of the superior court to grant; that the policy declared by the Legislature of the state concerning coercive conduct between employer and employee as to whether the employee should or should not join a particular union is a valid state policy and activities contrary thereto are unlawful; that such policy is in all essential respects the same as that declared by the legislatures of Maine and Wisconsin and held to be valid in the Stacey case *(Stacey v. Pappas, supra,* 350 U.S. 870) and the Vogt case *(International Brotherhood of Teamsters v. Vogt, Inc., supra,* 77 S.Ct. 1166) respectively; that, as in those cases, such policy is violated by bringing pressure to bear against an employer to coerce his employees to join or not to join a particular union; that the conduct of the defendants in the present case was contrary to that policy and for that reason unlawful and tortious; that the plaintiffs were entitled to maintain this action for damages resulting therefrom, and

that the trial judge had jurisdiction to award such damages. These conclusions are deemed to be consistent with the opinion and order of the Supreme Court in remanding this proceeding.

The judgment, insofar as it awards injunctive relief, is reversed. Insofar as it awards damages to the plaintiffs the judgment is affirmed, with costs to neither party in the present proceeding.

Shenk, J.

Schauer, J., Spence, J., and McComb, J., concurred.

DISSENTING OPINION

I dissent.

The United States Supreme Court remanded this case for a determination of the question whether plaintiffs have a cause of action under state law. The majority of this court now state that it is apparent from the remand that restrictions on the power of state courts to enjoin conduct that is an unfair labor practice are not applicable to an action for damages, and that if we did not have power to award damages, the Supreme Court would no doubt have so declared rather than remanded the case. The remand cannot bear such a construction. In its opinion, the Supreme Court specifically states that it does not reach the question whether an award of damages can be sustained under *United Construction Workers v. Laburnum Construction Corp.*, 347 U.S. 656 [74 S.Ct. 833, 98 L.Ed. 1025]. The court did not find it necessary to decide this question since our earlier opinion in the case did not state whether plaintiffs have a cause of

action under state law. If no cause of action for damages exists under state law, it is of course immaterial whether the policy of the federal statute does or does not permit the enforcement of such cause of action in the state courts. The Supreme Court, pursuing its usual policy of judicial economy, declined to answer a problem when an answer was not strictly compelled. Whatever we may think of the wisdom of this policy, considering the burden it places on litigants and the lower courts, it furnishes a complete explanation for the remand in the present case. Except insofar as earlier decisions of the Supreme Court provide guidance, the question is still open whether a state court has jurisdiction to award damages in the kind of case now before us.

Soon after *Garner v. Teamsters etc. Union,* 346 U.S. 485 [74 S.Ct. 161, 98 L.Ed. 228], the Supreme Court qualified the broad rule of that case in *United Construction Workers v. Laburnum Construction Corp.,* 347 U.S. 656 [74 S.Ct. 833, 98 L.Ed. 1025]. There the defendants employed threats of violence and an armed mob in an effort to compel the plaintiff to recognize them as the exclusive bargaining representative of its employees. The Supreme Court upheld state court jurisdiction to award damages for the injury to the employer's business resulting from such conduct, in spite of the assumption that it was also an unfair labor practice under section 8(b)(1). (29 U.S.C. § 158(b)(1).)

Language in the opinion suggested that jurisdiction to apply state law was preserved because the plaintiff

sought damages rather than an injunction and that the case was distinguishable from the Garner case because there state law attempted to provide a preventive remedy paralleling the preventive remedy available under federal law, whereas "here Congress has neither provided nor suggested any substitute for the traditional state court procedure for collecting damages for injuries caused by tortious conduct." (347 U.S. at 663-664.) Some state and federal cases have relied on this distinction in holding that damages may be awarded under state law for conduct markedly different from that in the Laburnum case. (*Lenz v. Compania Naviera Hidalgo, S.A.*, 233 F.2d 62, 65-66 [9th Cir.], rev'd on other grounds, 353 U.S. 138 [77 S.Ct. 699, 1 L.Ed.2d 709] [peaceful picketing constituting tort under Oregon law]; *Denver Bldg. & Constr. Trades Council v. Shore,* 132 Colo. 187, 196-197 [287 P.2d 267] [peaceful picketing in violation of Colorado Labor Peace Act]; *Benjamin v. Foidl,* 379 Pa. 540 [109 A.2d 300] [common-law conspiracy to deprive of employment]; *Dallas General Drivers v. Wamix, Inc.* (Tex.Civ. App.), 281 S.W.2d 738, 745-746, aff'd on other grounds, —— Tex. —— [295 S.W.2d 873] [peaceful picketing and secondary boycott in violation of Texas antitrust and antimonopoly statutes]; see *International Sound Technicians v. Superior Court,* 141 Cal. App.2d 23, 29-32 [296 P.2d 395]; *New York, New Haven & Hartford R. R. v. Jenkins,* 331 Mass. 720, 734-735 [122 N.E.2d 759], rev'd sub nom. *Local 25, Int'l Brotherhood of Teamsters v. New York, New*

Haven & Hartford R. R., 350 U.S. 155 [76 S.Ct. 227, 100 L.Ed. 166]; *Selchow & Righter Co. v. Damino*, 146 N.Y.S.2d 874, 876-877 [Sup.Ct.].)

Relying on this same analysis, other courts in actions by employees against unions have refused to award damages under state law on the ground that the National Labor Relations Board was empowered to give substantially the same relief under federal law by a back pay order. (*Born v. Laube*, 214 F.2d 349, denying rehearing in 213 F.2d 407 [9th Cir.], cert. denied, 348 U.S. 855 [75 S.Ct. 80, 99 L.Ed. 674]; *Sterling v. Local 438, Liberty Assn. of Steam & Power Pipe Fitters*, 207 Md. 132, 144-146 [113 A.2d 389], cert. denied, 350 U.S. 875 [76 S.Ct. 119, 100 L.Ed. 773], motion for leave to file petition for writ of prohibition denied, 351 U.S. 917; *Real v. Curran*, 285 App.Div. 552, 553-555 [138 N.Y.S.2d 809]; *Mahoney v. Sailors' Union*, 45 Wn.2d 453, 460-461 [275 P.2d 440], cert. denied, 349 U.S. 915 [75 S.Ct. 604, 99 L.Ed. 1249].)

Still other courts have held that damages may be given under state law in cases involving violence, apparently singling it out as the critical factor distinguishing the Laburnum case from the Garner case. (*International Longshoremen's etc. Union v. Hawaiian Pineapple Co.*, 226 F.2d 875, 883 [9th Cir.], cert. denied, 351 U.S. 963 [100 L.Ed. 1483, 76 S.Ct. 1026]; *International Union, United Automobile Workers v. Russell*, 264 Ala. 456 [88 So.2d 175, 180-182], cert. granted, 352 U.S. 915 [77 S.Ct. 213, 1 L.Ed.2d 121]; *Tallman Co. v. Latal*, 284 S.W.2d 547, 550-553 [Mo.];

see *International Union of Electrical etc. Workers v. Underwood Corp.*, 219 F.2d 100, 101 n. 3 [2d Cir.]; but see *Benz v. Compania Naviera Hidalgo, S.A.*, 233 F.2d 62, 66 [9th Cir.], rev'd on other grounds, 353 U.S. 138 [77 S.Ct. 699, 1 L.Ed.2d 709].) Under this analysis the reasons justifying jurisdiction to award damages would be substantially the same as those that justify state injunctive relief in cases of violence. (See 54 Columb.L.Rev. 1147, 1148.) It might seem self-evident, however, even in the absence of the Laburnum case, that if local interest in keeping public order is sufficient to preserve injunctions under state law, it is sufficient to preserve the less drastic remedy of damages.

A third possible basis for distinction might be found in the court's constant reiteration in its opinion that recovery is grounded on a common-law, apparently as distinguished from a statutory, tort. (See *Friendly Society of Engravers v. Calico Engraving Co.*, 238 F.2d 521, 524 [4th Cir.].) Why this distinction is relevant to the state's right to grant relief is not clear, unless it suggests a difference between state laws of general application and laws aimed specifically at labor relations. (See Cox, *Federalism in the Law of Labor Relations*, 67 Harv.L.Rev. 1297, 1321-1324.)

When the Laburnum case is read against the background of the Garner case, it is clear that these factors are not themselves the ultimate tests of state court jurisdiction to apply state law, but indications of whether or not there is a likelihood of conflict between state and federal policy. The possibility of

conflict of policies, pointed up in the Garner case, remains the principal consideration, whether damages or injunctive relief, violence or peaceful picketing, common-law or statutory rights to recovery are involved.

Thus, if there is a conflict between state and federal substantive rules in terms of conduct condemned or protected, state law must of course give way no matter what remedy it provides. Likewise, even if state and federal laws have an appearance of harmony, as applied by different tribunals they may become inconsistent and federal policy indirectly thwarted. This potential inconsistency was the consideration that lay behind the Garner decision and prompted the statement that, "A multiplicity of tribunals and a diversity of procedures are quite as apt to produce incompatible or conflicting adjudications as are different rules of substantive law." (346 U.S. at 490-491.) The notion of "conflicting remedies" is a shorthand way of pointing up this potential conflict in the application of substantive policies. Conversely, the conclusion that there is no "conflict of remedies" would seem to indicate that the different substantive rules as applied by different tribunals will not conflict in terms of conduct condemned or protected, and that once this absence of conflict is assured, federal law does not envisage its preventive remedy as necessarily the only one available to an injured party. (See 53 Mich. L.Rev. 602, 606-609.)

The Laburnum case illustrates this last situation. There was no conflict between the federal and state

substantive rules because the conduct was a tort under Virginia law and an unfair labor practice under the federal statute. There could be no conflict in the application of these rules because of the violent nature of the conduct involved, an element whose presence is underlined by the later description of the Laburnum case in the Weber opinion. (348 U.S. at 477.) The Supreme Court's decision in the present case, in stating that "Laburnum sustained an award under state tort law for violent conduct," whereas the present case involves a "different situation," further emphasizes the importance of violence in Laburnum, and that the rule of that case cannot be automatically extended to all awards of damages. The examples drawn by the court in the Laburnum case from legislative history to support the survival of state remedies all include references to violence (347 U.S. at 668-669), and the court's review was specifically restricted to the question of state jurisdiction "in view of the type of conduct found by the Supreme Court of Appeals of Virginia. . . ." (347 U.S. at 658.) The type of conduct gave assurance that in no event would federal policy be expounded by the board to condone that which the state there condemned.

This assurance was strengthened by the fact that the state was enforcing a law of general application rather than one aimed specifically at labor relations; from Virginia's point of view it was irrelevant that the defendants were labor organizations. Although this consideration is evidently not decisive (see *Weber v. Anheuser-Busch, Inc.*, 348 U.S. 468, 479 [75 S.Ct.

480, 99 L.Ed. 546]), its importance is made clear in the last paragraph of the opinion where it is said that, "If petitioners were unorganized private persons, conducting themselves as did petitioners here, Virginia would have had undoubted jurisdiction of this action against them. The fact that petitioners are labor organizations . . . provides no reasonable basis for a different conclusion." (347 U.S. at 669.)

Finally, since the state sought to compensate for a completed wrong rather than parallel the preventive remedy available through the board, the danger of conflict with federal policy was further reduced. However, since damages are a means of enforcing policy and controlling conduct, although somewhat less direct than an injunction, the form of the remedy alone would not seem to be the consideration determining whether state law may conflict with federal law.

It is readily apparent that the present case provides no such assurance that there will not be conflict between state and federal laws as applied. Defendants engaged in peaceful picketing, not threats and violence; their conduct was not of a type that gives any assurance how the National Labor Relations Board would view it under section 8(b), or that the board might not find it a protected activity under section 7. Furthermore, if recovery were permitted under state law, it would be based, not on law of general application, but on law aimed specifically at labor relations.

Section 303(b) (29 U.S.C. § 187(b)), gives a right of action for damages to any person injured by certain secondary boycott activities described in sec-

tion 303(a). (29 U.S.C. § 187(a).) Damages can be awarded under this section by any court that has jurisdiction of the parties, without a prior determination by the National Labor Relations Board that there has been an unfair labor practice. (See *International Longshoremen's Union v. Juneau Spruce Corp.*, 342 U.S. 237, 243-244 [72 S.Ct. 235, 96 L.Ed. 275].) It could be argued that these provisions show a congressional willingness to take the risk of inconsistent application by different tribunals of standards bearing on labor relations for the sake of compensating injured persons. A state court awarding damages under section 303, however, would interpret and apply federal law, and its decision could be brought into harmony with board determinations under section 8(b), and federal court adjudications under section 303 on review by the United States Supreme Court. The danger of inconsistency would be considerably less than when recovery is under state law.

Because of the danger of conflict in the application of state law with the National Labor Relations Board's application of the federal statute, the trial court was without jurisdiction to issue an injunction. I am of the opinion that for the same reason it was without jurisdiction to award damages.

Furthermore, even if the federal statute does not bar an award of damages, plaintiffs have no cause of action under the established law of this state. For almost 50 years it has been settled that a closed or union shop is a proper objective of concerted labor

activity because reasonably related to union welfare and the betterment of working conditions. This problem has been exhaustively considered in numerous decisions of this court, and the balance of values found to weigh in favor of judicial self-restraint in enjoining or penalizing union activities reasonably calculated to achieve these ends. Nevertheless, a majority of this court now in effect overrules these cases and abandons a policy whose wisdom is as clear now as it was when first adopted.

As early as *Parkinson Co. v. Building Trades Council* (1908), 154 Cal. 581 [98 P. 1027, 16 Ann.Cas. 1165 21 L.R.A. N.S. 550] this court held that it was not unlawful for a union to call a strike of employees and order a boycott to bring pressure on an employer who retained a nonunion worker, and thereby to enforce a closed shop. Exclusion of competition from nonunion workers was held a proper objective of concerted labor activity, and the court was unanimous in considering a strike a proper method of attaining this end.

McKay v. Retail Automobile Salesmen's Union, 16 Cal.2d 311, 315-325 [106 P.2d 373], presented the precise question involved in the present case: "Is it lawful for a labor union by peaceful picketing to attempt to induce an employer to employ only persons who are members of the picketing union when there is no strike and the employees of the picketed employer are satisfied with their employment and do not desire to join the union." (See dissenting opinion at 338.) The court held that the objective was lawful

and had a reasonable relation to the betterment of the conditions of labor, thus reaffirming and extending the principle of the Parkinson case. *Shafer v. Registered Pharmacists Union,* 16 Cal.2d 379, 383-388 [106 P.2d 403], decided at the same time as the McKay case, made it clear that sections 920-923 of the Labor Code do not restrict the right of labor to engage in concerted activity to attain a closed shop. These sections were enacted as a result of the efforts of organized labor, and their purpose was to outlaw the yellow-dog contract, not the closed shop or union activities to obtain a closed shop.

The reasons for permitting picketing to compel a closed shop even when none of the employees belong to the picketing union were articulated in *C. S. Smith Metropolitan Market Co. v. Lyons,* 16 Cal.2d 389, 401 [106 P.2d 414]: "The members of a labor organization may have a substantial interest in the employment relations of an employer although none of them is or ever has been employed by him. The reason for this is that the employment relations of every employer affect the working conditions and bargaining power of employees throughout the industry in which he competes. Hence, where union and nonunion employees are engaged in a similar occupation and their respective employers are engaged in trade competition one with another, the efforts of the union to extend its membership to the employments in which it has no foothold is not an unreasonable aim." The importance of attaining substantial equality in the economic struggle between unions and employers led to the conclusion that picketing to enforce a closed shop

should be permitted notwithstanding possible injury to the employer or the nonunion worker.

Magill Brothers, Inc. v. Building Service Emp. Intl. Union, 20 Cal.2d 506, 508 [127 P.2d 542], and *James v. Marinship Corp.,* 25 Cal.2d 721, 730 [155 P.2d 329, 160 A.L.R. 900], restated the law as established by the earlier cases, and in *Park & Tilford Import Corp. v. International Brotherhood of Teamsters,* 27 Cal.2d 599, 604 [165 P.2d 891, 162 A.L.R. 1426], it was declared once again, and without dissent, that under state law, considered alone, concerted activity for a closed shop is lawful even when undertaken by a union representing none of the employees. In *Charles H. Benton, Inc. v. Painters Local Union No. 333,* 45 Cal.2d 677, 681 [291 P. 2d 13], a decision handed down at the same time as our first decision in the present case, a majority of the court, obviously with the concurrence of those who dissented on other grounds, stated that, "independently of rights given under the federal statutes, under California decisions an employer may not obtain relief from economic pressure asserted in an effort to compel him to sign a union shop agreement." This proposition was not questioned by the majority in their earlier opinion in the present case.

From this review of the cases it is clear that, as to labor disputes to which federal law is in no way applicable, picketing to compel an employer to sign a closed shop agreement is picketing for a lawful purpose even when none of the employees are union members. We are now told, however, that these cases "have been superseded, in many respects by later law both

statutory and decisional," and that to "engage in the task of distinguishing and discussing them now would be a work of supererogation." It is true that the McKay case has been superseded on its precise facts by the Jurisdictional Strike Act (Lab. Code, §§1115-1120), if the employees' committee there resisting the union was not "financed in whole or in part, interfered with, dominated or controlled by the employer. . . ." (Lab. Code, §1117.) The McKay case did not hold, however, as suggested by the majority opinion in the present case, that section 923 of the Labor Code was ineffective as against the constitutional rights of the defendants. Detailed discussion of section 923 was reserved by the majority in the McKay case for treatment in *Shafer v. Registered Pharmacists Union, supra,* 16 Cal.2d 379, decided at the same time, and as stated above, that case squarely held, not that sections 920-923 of the Labor Code were constitutionally ineffective, but that those "sections lay no statutory restraints upon the workers' efforts to secure a closed shop contract from an employer. . . ." (16 Cal.2d at 388.) The court candidly recognized that the argument supporting the present majority's interpretation of section 923 had been accepted by several state courts, but it expressly concluded that such argument "is not in accordance with the law of this state, as judicially declared for many years, nor is it based upon a fair construction of sections 920 to 923 of the California Labor Code, considering their history and purpose." (16 Cal.2d at 388.) Moreover, the controlling effect of the Shafer case cannot be avoided by the suggestion

that perhaps the employees here involved had selected a committee to represent them and that therefore the Jurisdictional Strike Act is applicable. The pleadings and findings are barren of any suggestion that plaintiffs are seeking relief under the provisions of that act, and it may confidently be assumed that if there were any factual basis for such relief, plaintiffs would not have overlooked it. Accordingly, unless federal law has changed the rule of the Shafer case when interstate commerce is involved, there is no basis in state law for an award of damages in this case.

In *Park & Tilford Import Corp. v. International Brotherhood of Teamsters,* 27 Cal.2d 599, 603-606, 614 [165 P.2d 891, 162 A.L.R. 1426], we grappled with the effect of federal law on state law in this area. At the time of that decision the federal statute made it an unfair labor practice for an employer to enter into a closed shop agreement with a union that did not represent a majority of his employees. It was not an unfair labor practice, however, for a union to picket or use other concerted activity to compel an employer to sign such an agreement. The federal statute as then drawn embraced only employer unfair labor practices, and the National Labor Relations Board had no jurisdiction to provide a remedy for union conduct. We applied state law, but incorporated federal law. We reasoned that since under federal law it was unlawful for the employer to acquiesce in the union's demand for a closed shop, the union's demand and picketing in support of that demand were concerted activities for an improper purpose. These activities were un-

lawful as a matter of state law because state law adopted the federal characterization of the objective as improper.

Much has happened in the field of labor law since our decision in the Park & Tilford case, especially in regard to the relation between state and federal law. In the Park & Tilford case we felt it necessary indirectly to enforce federal law through our own rule prohibiting concerted activity for an unlawful purpose, since there appeared to be no other way to protect federal policy from union encroachment. Section 8(3) (now § 8(a)(3)) of the federal act prohibited an employer from signing a closed shop agreement with a union that did not represent a majority of his employees, but the board had no authority to proceed against a union bringing pressure on an employer to do what the act prohibited. This reason for our intervention in support of federal policy was removed by the enactment of the Labor Management Relations Act. That statute makes the union conduct itself an unfair labor practice subject to board control: section 8(b)(2) makes it an unfair labor practice to attempt to force an employer to violate section 8(a)(3). Thus the board is now fully able to assess the impact of union conduct on the federal policy embodied in 8(a)(3), and to vindicate that policy by proceeding directly against the union.

Furthermore, decisions of the United States Supreme Court since the Park & Tilford case, notably *Garner v. Teamsters Union*, 346 U.S. 485 [74 S.Ct. 161, 98 L.Ed. 228], and *Weber v. Anheuser-Busch*,

Inc., 348 U.S. 468 [75 S.Ct. 480, 99 L.Ed. 546], have made it clear that the definition and vindication of rights created by the federal act rest exclusively with the National Labor Relations Board. As Mr. Justice Carter pointed out in the earlier dissent in the present case, the board is an integral part of the federal law, and that law is not intended to apply when the board is not present. (45 Cal.2d at 668.) Congress has not created abstract rights to be free from unfair labor practices; it has created rights whose scope and nature depend on board definition. Federal policy does not require vindication in state tribunals. On the contrary, it requires that they not conflict with board action by attempting to enforce federal rights either directly, or indirectly by purporting to incorporate them into state law. Thus the very reasons that preclude us from giving injunctive relief for the violation of federal rights indicate that, assuming we could give damages, we should not do so if we are intelligently to apply our own unlawful purpose doctrine. In no meaningful sense is the purpose unlawful.

The object of defendants' conduct in the present case is unlawful only if we look to federal law to characterize it as such. From what has been said, it is clear that there is no reason to do so. The policy establishing the lawfulness of the purpose under state law is as valid now as it was when this court decided the McKay, Shafer, and C. S. Smith cases. They should not be overruled.

Traynor, J.

Gibson, C. J., and Carter, J., concurred.